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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, MARIAN JACKSON, REGINALD JAMES, EMMETT POMPEY, EFFIE L. SIMMONS, AND HELEN VANCE,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Is the Executive Branch's refusal to allocate any funds to a congressionally enacted program entirely immune from judicial review under the Administrative Procedure Act simply because, in appropriating funds for that program, Congress combined in a single appropriation funds "to carry into effect" that program "and" four other federal statutory programs.

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Petition for Writ of Certiorari
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for the District of Columbia Circuit

Petitioners International Union, United Automobile, Aeorspace and Agricultural Implement Workers of America (hereinafter "UAW"), Marian Jackson, Reginald James, Emmett Pompey, Effie L. Simmons, and Helen Vance respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case entered on October 23, 1984.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 746 F.2d 855 and is set forth in Appendix A. The opinions and orders of the district court are reported at 570 F.Supp. 210 and are set forth in Appendices B, C and D.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1984, and petitioners' timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on January 11, 1985. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On March 26, 1985, Chief Justice Burger, in No. A-724, granted a 60-day extension of time for the filing of this Petition to and including June 10, 1985. This Petition is timely filed.

STATUTORY PROVISIONS INVOLVED

Section 236(a) of the Trade Act of 1974, as amended, 19 U.S.C. § 2296(a) (1981), provides:

> "(1) If the Secretary [of Labor] determines that—
> (A) there is no suitable employment (which may include technical and professional employment) available for a worker,
> (B) the worker would benefit from appropriate training,
> (C) there is a reasonable expectation of employment following completion of such training,
> (D) training approved by the Secretary is available to the worker from either governmental agencies or private sources (which may include area vocational education schools, as defined in section 2461(2) of Title 20, and employers), and
> (E) the worker is qualified to undertake and complete such training,

the Secretary may approve such training for the worker. Upon such approval, the worker shall be entitled to have payment of the

costs of such training paid on his behalf by the Secretary. Insofar as possible, the Secretary shall provide or assure the provision of such training on the job, which shall include related education necessary for the acquisition of skills needed for a position within a particular occupation."

Pub.L. No. 97-51, 95 Stat. 958 (1981), and Pub.L. No. 97-85, 95 Stat. 1098 (1981), the First and Second Continuing Budget Resolutions for FY 1982, incorporated the following budgetary language from H.R. 4560, 97th Cong., 1st Sess. (1981):

> "EMPLOYMENT AND TRAINING ASSISTANCE
>
> For expenses necessary to carry into effect the Comprehensive Employment Training Act of 1973, as amended, sections 236, 237, and 238 of the Trade Act of 1974, as amended (19 U.S.C. 2101), section 51 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 51), sections 210, 211, and 212 of Public Law 95-250, and the Veterans' Employment and Readjustment Act of 1972, as amended (38 U.S.C. 2003A), including the purchase and hire of passenger motor vehicles, the construction, alteration, and repair of buildings and other facilities, and the purchase of real property for training centers as authorized by the Comprehensive Employment and Training Act of 1973, as amended, $3,671,129,000 plus reimbursements, of which $2,001,000 shall be for the National Commission for Employment Policy: *Provided,* that no funds from any other appropriation shall be used to provide meal services at or for Job Corps Centers."

Section 101(a)(6) of Pub.L. No. 97-92, 95 Stat. 1183 (1981), the Third Continuing Budget Resolution for FY 1982, provided:

> "[T]he following sums are appropriated out of any money in the Treasury not otherwise appropriated . . . namely:
>
> * * * * *
>
> (6) In addition to any sums otherwise appropriated there is appropriated an additional sum of $25,000,000 which shall be made available for training, job search allowances and

relocation allowances, under sections 236, 237, and 238 of the Trade Act of 1974."

5 U.S.C. §701(a) provides:

"This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law."

5 U.S.C. §706 provides, in part:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."

STATEMENT OF THE CASE

The issue in this case is whether the Secretary of Labor's deliberate refusal to spend funds appropriated by Congress "to carry into effect" the job training provisions of the Trade Act of 1974, 19 U.S.C. §§ 2101 *et seq.*, as amended, is judicially reviewable under the Administrative Procedure Act. A panel of the United States Court of Appeals for the District of Columbia Circuit held that the Secretary's decision not to provide funding to that program was "committed to agency discretion by law" and therefore completely unreviewable under 5 U.S.C. § 701(a)(2). *En banc* review of that decision was denied by a split 5-5 vote of the full circuit.

The court of appeals' ruling is completely contrary to established principles of judicial review under the Administrative Procedure Act, which this Court reaffirmed as recently as *Heckler*

v. Chaney, ___ U.S. ___, 105 S.Ct. 1649 (1985). The court's ruling is also flatly inconsistent with the decisions of numerous courts, including this Court, which hold that when an appropriations bill includes language requiring the Executive to implement a particular program, the Executive's refusal to do so is judicially reviewable. *See, e.g., Train v. City of New York*, 420 U.S. 35, 42-46 (1975). Finally, by granting the Executive absolute, unreviewable discretion to disregard language of limitation contained in a multiprogram appropriation bill, the court of appeals' ruling fundamentally erodes Congress' control over the appropriations process, which has been described as "the most important single curb in the Constitution on presidential power."[1]

A. The Statutory Scheme

Prior to 1981, the worker assistance provisions of the Trade Act provided two major categories of federally funded benefits to workers who were laid off from their jobs as a result of foreign import competition. First, in order to help these workers support themselves while unemployed, the Act provided up to 52 weeks of trade readjustment allowance benefits ("TRA") as a supplement to their state unemployment insurance benefits. Second, in order to encourage these workers to learn new job skills and to help support them while they were undergoing job retraining, the Act provided for payment of up to 26 weeks of additional "extended" TRA benefit payments for workers in approved retraining programs under the Act. See 19 U.S.C. §§ 2281-82, 2284, 2285 (1974).

Congress amended the Trade Act in its Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35, 95 Stat. 881, in order to shift the focus of the Act away from income maintenance and in favor of increased worker retraining.[2] Congress sought to

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[1] Corwin, *The Constitution and What It Means Today*, at 101 (13th Ed. 1975).

[2] *See, e.g.*, Senate Hearings, Subcommittee of the Committee on Appropriations, 97th Cong., 1st Sess., at 648 (April 7, 1981) ("The thrust of the Reagan Administration's proposal is to deemphasize the cash outlay provisions of the Trade Act program and place a greater emphasis on training, job search and relocation assistance").

achieve this result by reducing the amount and duration of weekly TRA payments available to eligible workers, while amending section 236 of the Act, 19 U.S.C. § 2296(a), to provide that workers whose training was approved by the Secretary would be entitled to have their subsequent costs of training paid in full by the federal government.

Six weeks after amending the Trade Act, Congress passed its First Continuing Budget Resolution for FY 1982, Pub.L. No. 97-51, 95 Stat. 958 (1981). This budget resolution, which incorporated the language and budgetary amounts of the House Appropriations bill, H.R. 4560, 97th Cong., 1st Sess. (1981), appropriated approximately $3.7 billion to the Employment and Training Assistance account ("ETA account") of the Department of Labor for "expenses necessary to carry into effect . . . sections 236, 237 and 238 [the job retraining provisions] of the Trade Act, as amended (19 U.S.C. 2101) . . . and [four other programs]."[3]

The Secretary of Labor concedes that he *could* have used funds from this FY 1982 ETA appropriation to provide Trade Act training to eligible workers. App., at 19, 29. Nonetheless, for reasons that he never explained, the Secretary spent *none* of this $3.7 billion on Trade Act training. Despite the express appropriations language and the extensive supporting legislative history, the Secretary in early FY 1982 informed the state agencies who administered the Trade Act as his agents (19 U.S.C. § 2311) that none of the funds from this $3.7 billion appropriation, or from the identical appropriation in Congress' Second Continuing Budget Resolution for FY 1982, Pub.L. No. 97-85, 95 Stat. 1098 (1981), were to be spent on Trade Act training, and that all applications for training approval and tuition reimbursement under section 236 of the Act must therefore be denied. App., at 3; Jt. App., at 36-52.[4]

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[3] Sections 237 and 238 of the Trade Act, 19 U.S.C. §§ 2297, 2298, provide job search allowances and relocation allowances for eligible import-affected workers.

[4] While the court of appeals stated that the Secretary subsequently allocated the entire $3.7 billion to the four other programs designated in

In mid-December 1981, Congress enacted its Third Continuing Budget Resolution for FY 1982, Pub.L. No. 97-92, 95 Stat. 1183 (1981). This budget resolution reappropriated the earlier $3.7 billion, and supplemented that appropriation by earmarking an "additional" sum of $25 million for Trade Act training. The pertinent language of this appropriations bill provided:

> *In addition to any sums otherwise appropriated* there is appropriated an *additional* sum of $25,000,000 which shall be available for training, job search allowances and relocation allowances, under sections 236, 237, and 238 of the Trade Act of 1974.

Id., at § 101(a)(6) (emphasis added). Although the sponsors of this supplemental appropriation expressly stated that Congress was providing $25 million *more* for Trade Act training,[5] the Secretary in FY 1982 funded Trade Act training *only* from this supplemental appropriation. At no time during FY 1982 did the Secretary spend *any* of the $3.7 billion ETA appropriation on worker retraining under the amended Trade Act. App., at 5, 35.

The effects of the Secretary's denial of funding were quickly felt, and they contrasted sharply with Congress' goal of *increasing* training opportunities for the 650,000 workers who were potentially eligible for Trade Act benefits. App., at 18. While 20,000 unemployed workers had been approved for training in FY 1981, *no* workers were approved for training under section 236 of the Trade Act in the first quarter of FY 1982, and only 191 workers were approved for training by the end of the second quarter. Jt.

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the FY 1982 ETA appropriation, App., at 5, the facts are squarely to the contrary. At the close of FY 1982, a budgetary surplus of $85 million remained in the Secretary's ETA account, and at least $8.5 million of that sum had *never* been obligated by the Secretary to *any* program. *See* Court of Appeals Joint Appendix (hereinafter "Jt. App."), at 106 (Declaration of ETA Budget Officer); App., at 38.

[5] *See* 127 Cong. Rec. H9120 (daily ed, Dec. 10, 1981) (remarks of Cong. Conte) (this supplemental appropriation "adds $2[5] million for trade adjustment assistance and training activities"); *id.*, at H9131 (remarks of Cong. Schneider) (under this supplemental appropriation, "[t]rade adjustment assistance will receive $2[5] million more").

App., at 69, 71. More than 95% of the workers who had been enrolled in approved training at the start of FY 1982 were forced to withdraw from such training due to lack of funds. Jt. App., at 62-63. Moreover, even though the Secretary made some funds available for training in January or February 1982 (as a result of the supplemental $25 million appropriation), that money was inadequate to meet program needs, and the state agencies were again forced to deny training approval to thousands of eligible workers on the ground that no funds had been made available to pay for training. Jt. App., at 62. The result of the Secretary's denial of funds for Trade Act training, then, was that hundreds of thousands of unemployed workers were denied the statutory job training benefits that Congress had expressly made available to them, and were thus prevented from learning new job skills that would have enabled them promptly to reintegrate themselves into the American workforce.

B. History of the Litigation

Petitioners UAW *et al.*[6] brought this suit on May 27, 1982, alleging, *inter alia,* that the Secretary of Labor had violated the Administrative Procedure Act and the amended Trade Act by refusing to spend any of the funds appropriated by Congress in its First and Second Continuing Budget Resolutions for FY 1982 on Trade Act training, notwithstanding the extremely high levels of unemployment that then existed and the correspondingly high need for worker retraining. The district court ruled in petitioners' favor, holding that the language of the Trade Act and the pertinent appropriations bills evidenced Congress' clear intent that the Secretary of Labor implement this worker retraining program from the $3.7 billion appropriated by Congress in its First and Second Continuing Budget Resolutions, and holding further that the Secretary's refusal to allocate *any* of these funds to the Trade Act training program constituted an abuse of

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[6] Petitioners include five unemployed autoworkers and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, which sued on its own behalf and on behalf of hundreds of thousands of its affected members.

discretion and a violation of congressional intent. App., at 28-31, 38-39. [7]

The court of appeals (per Scalia, J.) reversed, holding that despite the express congressional directive in the FY 1982 ETA appropriation "to carry into effect" the Trade Act training program "and" four other designated programs, that appropriation was a "lump sum" appropriation that was "drawn in such broad terms that . . . there is no law to apply." App., at 14, *quoting Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). Without discussing *any* of the pertinent appropriations language or *any* of the legislative history in support of petitioners' interpretation of that language, and without ever once referring to the strong presumption of judicial reviewability under the Administrative Procedure Act, see *infra*, at 10-11, the court of appeals concluded that the Secretary's decision not to provide any funding for Trade Act training from that FY 1982 appropriation was

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[7] In response to the Secretary's argument that his decision not to fund Trade Act training was committed to agency discretion by law, the District Court held:

> [Although the] Secretary was not required to spend all funds appropriated to the Department of Labor in the continuing resolutions [, t]his does not . . . endow him with the authority to use unfettered discretion as to when and how the monies may be used. . . . The need to ensure that the Secretary exercised a reasoned discretion in funding and operating the training program enacted by Congress, together with the strong presumption of judicial review, compel the court to reject the Secretary's argument of unreviewability.

App., at 30-31. The court then ordered the Secretary, "exercising his reasoned discretion, to provide to the Court . . . a plan of funding Trade Act training costs from available fiscal year 1982 funds . . . for Trade Act training." App., at 33. After reviewing the plan submitted by the Secretary, and after determining, based upon the testimony of a Department of Labor Budget Officer, that an $85 million surplus remained in the Secretary's ETA account at the close of FY 1982, the district court ordered the Secretary to exercise his discretion to make those funds available to workers who still met the statutory eligibility criteria and who had been denied training benefits as a result of the Secretary's withholding of appropriated funds. App., at 39-43.

"committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2) and thus completely unreviewable. *Ibid.* Because the court decided the case on the basis of that threshold issue of reviewability, it never reached the principal issue litigated by the parties, which was whether, as the district court had found, the Secretary of Labor abused his discretion by refusing to fund the Trade Act training program through the $3.7 billion FY 1982 ETA appropriation.

On December 6, 1984, petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc. On January 11, 1985, the panel denied the Petition for Rehearing and an equally divided court of appeals denied petitioners' Suggestion for Rehearing en Banc. App., at 48-50.

REASONS FOR GRANTING THE PETITION

A. The Opinion of the Court of Appeals Squarely Conflicts With Opinions of This Court and Other Courts of Appeals With Respect to the Judicial Reviewability of Final Agency Action, Including Action with Respect to Funding Allocation.

As this Court has frequently stated, the Administrative Procedure Act creates a strong presumption that agency actions are judicially reviewable. *See, e.g., Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967), *quoting Rusk v. Cort,* 369 U.S. 367, 379-80 (1962); *Barlow v. Collins,* 397 U.S. 159, 166-67 (1976). While there exists an exception in the Act for agency action that is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), that is a "very narrow exception" which precludes judicial review only in those "rare instances" in which the governing legislation is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410 (1972), *quoting* S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). If the legislative scheme provides any "meaningful standard against which to judge the agency's exercise of discretion," courts must find that there is "law to apply"

under section 701(a)(2) and that the agency action is judicially reviewable. *Cf. Heckler v. Chaney, supra,* 105 S.Ct., at 1655.[8]

The opinion of the court of appeals is utterly inconsistent with these principles. First, instead of applying the "strong presumption of reviewability" to the Secretary's funding decision (an approach that would undoubtedly have changed the court's result on the reviewability issue, given the court's recognition that the appropriations language enacted by Congress "could" be read to support petitioners' construction of congressional intent, App., at 12), the court instead created a presumption of *un*reviewability, which it would apply to *all* funding decisions made pursuant to so-called "lump-sum" congressional appropriations.[9] This unprecedented creation of an exception to the presumption of reviewability under the Administrative Procedure Act creates a direct conflict with opinions of both this Court and virtually every federal court of appeals (including the D.C. Circuit itself in earlier cases) which recognize the continued vitality of the principle that agency action or inaction is presumptively reviewable. *See, e.g., Abbott Laboratories v. Gardner, supra,* 387 U.S., at 140-41; *Alaniz v. Office of Personnel Management,* 728 F.2d 1460, 1463-64 (Fed. Cir. 1984); *Hondros v. Civil Service*

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[8] While this Court in *Heckler v. Chaney, supra,* stated that this presumption is reversed in cases challenging "an agency's decision not to take enforcement action," it reiterated that all other final agency action or inaction remains presumptively reviewable under the APA. *See* 105 S.Ct., at 1655, 1659.

[9] It is noteworthy that despite the overwhelming weight of judicial authority to support the presumption of reviewability under the APA, two of the judges on the panel below have previously stated that in their view there should *never* be a presumption of reviewability under *any* circumstances under the APA. *See Chaney v. Heckler* , 718 F.2d 1174, 1193-95 (D.C. Cir. 1983), *rev'd,* 105 S.Ct. 1649, *supra* (Scalia, J., dissenting); *id.*, 724 F.2d 1030, 1031 (D.C. Cir. 1984) (Scalia, J., joined by Starr, J., *et al.*, dissenting from denial of rehearing *en banc*). While this Court agreed in *Heckler* that the presumption of reviewability was inapplicable *to agency decisions not to enforce,* it rejected the dissenting judges' analysis with respect to *other* agency action, which this Court reaffirmed *is* presumptively reviewable. *See supra,* at n. 8.

Comm'n, 720 F.2d 278, 291-92 (3rd Cir. 1983); *N. Ga. Bldg. & Constr. Trades v. Goldschmidt*, 621 F.2d 697, 708 (5th Cir. 1980); *Hartigan v. Federal Home Loan Bank Bd.*, 746 F.2d 1300, 1305 (7th Cir. 1984); *Tuepker v. Farmers Home Admin.*, 708 F.2d 1329, 1332 (8th Cir. 1983); *Tran Qui Than v. Regan*, 658 F.2d 1296, 1301 (9th Cir. 1981); *Pitzak v. Office of Personnel Management*, 710 F.2d 1476, 1478 (10th Cir. 1983); *Local 1219, AFGE v. Donovan*, 683 F.2d 511, 515 (D.C. Cir. 1982).

Second, by holding that the Executive Branch's refusal to spend appropriated funds on the congressionally enacted Trade Act program is not reviewable, the court of appeals' opinion creates a direct conflict with numerous cases, including the so-called "impoundment" cases, which hold that when Congress enacts appropriations language requiring the Executive to fund a particular statutory program, the Executive's decision not to allocate the available funding is judicially reviewable for abuse of discretion under the Administrative Procedure Act. *See, e.g., Train v. City of New York*, 420 U.S. 35, 43 (1975); *State Hwy. Comm. v. Volpe*, 479 F.2d 1099, 1108-10, 1112-14 (8th Cir. 1973); *Sioux Valley Empire Electric Assoc. v. Butz*, 504 F.2d 168, 171-73 (8th Cir. 1974); *City of Los Angeles v. Adams*, 556 F.2d 40, 43, 50 (D.C. Cir. 1977); *Comm. of Pennsylvania v. Lynn*, 501 F.2d 848, 855 (D.C. Cir. 1974). The court below viewed those cases as limited to single-program rather than multiprogram appropriations. App., at 12. However, neither *Train* nor any of the other cases suggest any such *per se* limitation, nor is there any principled basis for creating such a limitation, particularly where, as here, both the pertinent appropriations language and the applicable legislative materials indicate an express congressional intent that the Secretary fund *each* of the designated statutory programs.

Finally, the court's opinion ignores that Congress frequently makes multiprogram appropriations, as it did in this case, without designating the *specific* amount of funding the Executive must spend in order to implement *each* of the designated programs.[10] If

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[10] *See, e.g.*, H.R. 6028, 98th Cong., 2d Sess., at 33 (1984) (appropriating $2 billion "[f]or carrying out, except as otherwise provided, the

as a result of the court's opinion the Executive is henceforth given *unreviewable* discretion to refuse to allocate appropriated funds to one or more programs funded through a multiprogram appropriation, Congress will no longer be able to leave *any* discretion in the Executive with respect to the relative funding level of programs funded through such appropriations unless it is willing to risk an Executive "veto" of a designated program, or programs, through a denial of funding. Instead, Congress will have to spell out specific funding levels for each program separately. Whether Congress' flexibility in directing the Executive Branch is to be constricted in this way is surely an important issue meriting this Court's attention.

B. There Is "Law to Apply" in the Language of the Department of Labor Appropriations Act.

The language of the ETA appropriation for FY 1982 is unequivocal. It provides $3,671,129,000 "[f]or expenses necessary to carry into effect" the Trade Act training program ("as amended" six weeks earlier) "and" four other programs. See H.R. 4560, 97th Cong., 1st Sess., *supra*. This appropriations language did *not* provide funds to carry into effect Trade Act training "or" four other programs, or to carry in effect Trade Act training "if the Secretary so chooses." Yet despite this statutory language, and despite numerous other indicia of Congress' intent that the Secretary implement the Trade Act training program

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Older Americans Act of 1965, the Runaway and Homeless Youth Act, the Native Americans Program Act, the Developmental Disability Assistance and Bill of Rights Act, the Child Abuse Prevention and Treatment Act, and the Head Start Act of 1981"); *id.*, at 55 (appropriating $282 million "[f]or carrying out subpart 4 of part A of title IV; titles VI, VIII, and IX; parts B, C, D, and E of title IX; and sections 420, 734, and 1204(c) of the Higher Education Act of 1965, as amended; section 102(b)(6) of the Mutual Educational and Cultural Exchange Act of 1961; and the Minority Institutions Science Improvement Program").

through this $3.7 billion appropriation,[11] that is the construction adopted by the court of appeals.

Under the court's analysis, the Secretary of Labor would have been free to take the $3.7 billion ETA appropriation for FY 1982 and spend nothing on CETA, nothing on tax credits for employment of new employees (26 U.S.C. § 51), nothing on the Veterans' Employment and Readjustment Act and nothing on Trade Act training, leaving the entire $3.7 billion for training benefits for employees disadvantaged by the expansion of the Redwood National Park (Pub.L. No. 95-250).[12] Since the full $3.7 billion obviously would not have been needed for this particular program, the Secretary could then have deobligated the unused amount—as indeed he did in the present case.[13] Under the court of appeals' opinion, this absurd result would be completely unreviewable.

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[11] For example, Congress in its Third Continuing Budget Resolution for FY 1982 appropriated an "additional" $25 million for Trade Act training. *See* Pub. L. No. 97-92, 95 Stat. 1183, § 101(a) (6), *supra*. The district court found that Congress' use of the word "additional" reflected its understanding that a previous allocation had already been mandated, App., at 29-30, and the court of appeals acknowledged that the statutory language "could indicate such an understanding." App., at 12. *See also supra*, at n.5 (quoting the remarks of Congs. Conte and Schneider); 127 Cong. Rec. S14965 (daily ed., Dec. 10, 1981) (remarks of Sen. Hatfield) ("We are trying to protect programs rather than empower the administration with authority to impound or to destroy or strangle programs"); App., at 27-29 (noting that only six weeks prior to the enactment of the First Continuing Budget Resolution, Congress had authorized to be appropriated "such sums as may be necessary to carry out the purposes of this chapter [amending the Trade Act training program]").

[12] These are the five programs that Congress required the Secretary to "carry into effect" in the FY 1982 ETA appropriation. *See* H.R. 4560, 97th Cong, 1st Sess., *supra*.

[13] *See* Jt. App., at 106-07 (in FY 1982, the Secretary of Labor deobligated $76.5 million in unspent funds that had been appropriated to the ETA account).

It is inconceivable that Congress would have granted the Secretary unfettered discretion to make such a bizarre and inequitable allocation of appropriated funds, free from the constraints of judicial review. Congress designated five specific statutory programs in its FY 1982 ETA appropriation because it had identified a pressing need for job retraining among the millions of unemployed American workers who met the eligibility criteria for those five designated programs. Congress intended the Secretary "to carry [those programs] into effect," exercising reasoned discretion in his allocation scheme in order to most effectively serve all of the program needs. See *infra*, at 18-21. Judicial review should be available, as this Court and other courts have uniformly held, to ensure that the Secretary's allocation of funds is not so inconsistent with statutory goals as to constitute an abuse of discretion under the APA.

1. Until the decision below, it had long been settled that when Congress expresses its intent that a statutory program be implemented, the Executive Branch may not set itself up as a superlegislature and decide for itself, through the exercise of a *de facto* line item veto, that the program is not worthy of funding. *See, e.g., State Hwy. Comm. v. Volpe*, 479 F.2d 1099, 1108-10, 1112-14 (8th Cir. 1973); *Comm. of Pennsylvania v. Lynn*, 501 F.2d 848, 855 (D.C. Cir. 1974). Similarly, the Executive may not deprive a statutory program of the funds necessary for its existence simply because it might prefer that another program, or programs, be given a disproportionate share of an appropriation. *See, e.g., Sioux Valley Empire Electric Assoc. v. Butz*, 504 F.2d 168, 171-73 (8th Cir. 1974); *City of Los Angeles v. Adams*, 556 F.2d 40, 43, 50 (D.C. Cir. 1977). Rather, once Congress creates a program and appropriates funds for its implementation, the Executive has no choice but to comply with congressional intent. Judicial review is available to determine whether the Executive did in fact comply—*i.e.*, whether the Executive had a reasonable basis for its funding decisions that was consistent with congressional intent. See also *Train v. City of New York*, 420 U.S. 35, 43 (1975) (EPA Administrator had discretion to spend less than full amount of appropriation only "[i]f the States failed to submit projects sufficient to require obligation . . . or if the Administrator,

exercising whatever authority the Act might have given him to deny grants, refused to obligate these total amounts").[14]

2. The court of appeals' analysis of the reviewability issue rested in large part upon its characterization of the FY 1982 ETA appropriation as a "lump-sum appropriation." Citing a series of Comptroller General decisions which state, as a general principle, that when Congress makes lump-sum appropriations it confers broad discretion on the Executive to pick and choose among the programs covered by the appropriation, the court announced as a *per se* matter that all multiprogram appropriations are "lump-sum" appropriations, and that all lump-sum appropriations are presumptively intended to vest the Executive with absolute funding discretion. See App., at 10. This approach, however, substitutes conclusionary labeling for reasoned analysis. While there may be appropriations that contain no language of limitation or control, the presumption of judicial reviewability requires at the very least that when an appropriation *does* contain such language of limitation or control, as it does here, the judiciary must be empowered to review the Executive's funding decisions for conformity with the congressional purposes. Put another way, just as

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[14] The court of appeals seemed to suggest a distinction between the present case and some of the cases cited by petitioners based upon the fact that those were "impoundment" cases. App., at 12-13. However, even if the present case were *not* an impoundment case (which in fact it is, because at least $8.5 million of the $85 million FY 1982 budgetary suplus in the ETA account was never federally obligated, *see supra*, at n.4), the court's purported distinction would still be spurious. The issue in the impoundment cases, as in the present case, concerned the Executive's failure to implement a particular program enacted by Congress: No one claimed that Congress had any separate interest in having money spent for its own sake. Judicial review has until now always been available in such cases to determine (1) whether Congress intended federal funds to be spent on a particular program, and (2) whether the Executive complied with that intent. While a problem of retroactive relief might arise in nonimpoundment cases if the appropriated funds have already been spent, that problem does not exist in the present case, because the Secretary conceded that he ended FY 1982 with a substantial budgetary surplus in the ETA account from which Trade Act training legally could be funded. App., at 38.

there is "law to apply" under 5 U.S.C. § 701(a)(2) in the single-program cases cited by petitioners even though the precise amount of funding in those cases is to a large degree left to Executive discetion, so too is there "law to apply" in the present case even though a large measure of discretion is left to the Executive in its allocation decisions. In both types of cases, Congress has included language in its appropriations bill that limits the extent to which Executive discretion may be exercised.[15]

Unlike the unrestricted lump-sum appropriation in *LTV*, *supra*, n.15, the $3.7 billion ETA appropriation for FY 1982 *did* "impose qualifications, requirements, or restrictions" on the Secretary's

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[15] Expenditures made pursuant to a "lump-sum appropriation" are unreviewable only if there is no statutory indication as to whether, or how, the money should be allocated. In *LTV Aerospace Corp.*, 55 Comp. Gen. 307 (Oct. 1, 1975), for example, which was the Comptroller General opinion principally relied upon by the court of appeals, App., at 11, the Comptroller General was called upon to construe a $3 billion lump-sum appropriation to the Defense Department for "RESEARCH, DEVELOPMENT, TEST, AND EVALUATION, NAVY." No specific projects were identified in the appropriations language, but when the Navy began funding the development of a new F-18 fighter aircraft from that account, the manufacturer of a competing aircraft filed a protest, pointing to legislative history that expressed Congress' intent *not* to permit the expenditure of funds for the F-18. The Comptroller dismissed this protest, stating:

> [W]hen Congress merely appropriates lump-sum amounts *without statutorily restricting what can be done with those funds*, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies [as to how to allocate the appropriated funds].

55 Comp. Gen., at 319 (emphasis added). Because there was no language in the *LTV* appropriation "that purported to impose qualifications, requirements, or restrictions" on the Defense Department's research expenditures—either for particular aircraft projects or otherwise—the Comptroller General concluded that Congress intended to permit the agency to determine for itself which aircraft, if any, to develop. *Id.*, at 317.

expenditure of funds, as it specifically required the Secretary to use those funds to "carry into effect" each of the five designated programs. While Congress could have exercised greater control over the Secretary's allocation decisions—by providing separate line-item appropriations for each of these programs plus each of the more than 100 subprograms funded through the ETA account[16]—Congress determined instead that the Secretary should have flexibility (but *not* absolute, unreviewable discretion) in allocating the funds necessary to carry those programs into effect. Congress required only that *each* of the programs receive funding, and that the amount of such funding be based upon the secretary's exercise of reasoned decision making, consistent with the statutory goals.

Congress has long understood that when it appropriates funds to programs A, B and C, the Executive will provide funding to each of those programs.[17] While such a multiprogram appropriation gives the Secretary reasoned discretion to determine the relative *amount* of funding for each program, the congressional directive to "carry into effect" each designated program leaves him no discretion to determine the *fact* of funding for each such program. Indeed, even if insufficient funds have been appropriated to serve the needs of all of the program beneficiaries, the Executive must still make a reasoned allocation among the

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[16] *See* Jt. App., at 60; Def. Supp. Ans. to Interrog. No. 43(a). Congress made only one such line-item appropriation in its ETA appropriation, when it required the Secretary to spend $2,001,000 on the National Commission for Employment Policy (which was one of the more than 100 subprograms funded through the $3.7 billion ETA account). *Compare, e.g.*, Pub. L. No. 98-411, 98 Stat. 1562 (1984) (appropriation for Commission on Civil Rights in which Congress earmarked a specific sum for each separate category of expenditure, thus depriving Commissioner of discretion in his allocation decisions).

[17] *See, e.g.*, H.R.Rep. No. 1879, 49th Cong., 1st Sess., at 3 (1886) ("Where Congress has appropriated for A and for B, Congress means to say that it gives to each, conditioned upon the gift to the other, and that it gives to neither unless it gives to both. That is the just interpretation of its act.").

designated programs.[18] In short, the Executive is not free to ignore a congressional appropriation to carry into effect a particular program simply because it believes that other programs should have a higher funding priority.[19]

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[18] As this Court stated in *Morton v. Ruiz*, 415 U.S. 199 (1974), after having determined that Congress intended the Bureau of Indian Affairs to provide general assistance benefits to certain American Indians living on or near an Indian reservation:

> [I]f there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries.

415 U.S., at 230-31.

[19] Because the statutory language is plain on its face, resort to the legislative history is not necessary to establish that Congress intended the Secretary to fund Trade Act training in FY 1982 from the $3.7 billion ETA appropriation. Nonetheless, because the court of appeals referred in passing to the legislative history, petitioners will briefly respond to the court of appeals' suggestion that Congress acquiesced in the Secretary's refusal to fund the Trade Act training program. *See* App., at 7-9. In fact, the exact opposite is true.

Each of the post-enactment statements cited by the court of appeals were made by Congressmen who *favored* Trade Act training and who were unsuccessfully urging their colleagues to earmark a *specific* sum of money from the $3.7 billion to ensure a fixed, guaranteed minimum level of participation in the Trade Act training program. Cong. Pease, for example, sought to "insure that *at least* $20 million will be available in fiscal year 1982 to fund TAA employment training." 127 Cong. Rec. H7088 (daily ed., Oct. 6, 1981) (remarks of Cong. Pease). He therefore sought to "allocate *at least* $20 million for TAA employment training of the more than $3.6 billion appropriated in the bill for employment and training assistance." *Ibid.* Similarly, Senators Danforth and Moynihan attempted to earmark *at least* $98.6 million for Trade Act training. *See* 127 Cong. Rec, S13719 (daily ed., Nov. 19, 1981)

3. The court of appeals also suggested that the Secretary's allocation decisions should be unreviewable because "[t]he distribution of public funds among competing social programs is an archetypically political task" that the judiciary is not equipped to perform. App., at 13. However, this statement demonstrates only that the court of appeals misunderstood the nature of relief that petitioners had requested.

Petitioners fully agree that it is not the judiciary's function to determine the precise amount of funds that should have been allocated from the FY 1982 ETA appropriation for each of the programs designated by Congress. However, it *is* the judiciary's function to determine whether the funding allocation decisions made by the Secretary were reasonable and consistent with his statutory mandate "to carry into effect" each of those programs. As Professor Davis has stated:

> A court is well qualified to determine whether the agency abused its discretion, even with respect to a question it is not qualified to decide. All courts are qualified to inquire into such questions, not in order to decide what the court would do if it were making the decision, but in order to decide whether or not the agency was behaving rationally in making

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(remarks of Sen. Danforth); 127 Cong. Rec. S13722 (daily ed., Nov. 19, 1981) (remarks of Sen. Danforth); 127 Cong. Rec. S13722 (daily ed., Nov. 19, 1981) (remarks of Sen. Moynihan). Rather than suggesting that Congress had intended to give the Secretary unfettered discretion to deny funding to the Trade Act entirely under the $3.7 billion ETA appropriation, these statements suggest only that the Act's supporters were responding to the Secretary's failure to allocate funds by attempting to earmark a *specific* minimum amount of funding that the Secretary was required to spend on Trade Act training. Other legislative history confirms this conclusion. *See, e.g.*, S.Rep. No. 97-268, 97th Cong., 1st Sess., at 10 (1981) ("The Committee expects that the Secretary will use a reasonable amount of available funds [from the ETA appropriation] for projects that will assist displaced workers to return to self-sustaining productive employment through retraining, relocation and related activities . . ."); *supra*, at n.5 (quoting remarks of Congs. Conte and Schneider that the supplemental appropriation provided $25 million "more" for Trade Act training); App., at 27-28 (additional legislative history relied upon by the district court).

that decision, that is, whether the agency abused its discretion.

K. Davis, *Administrative Law Treatise*, § 28:7, at 285 (1984). *Accord, Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S., at 416; *Environmental Defense Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981); *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966). The district court had no difficulty making such a determination in this case, and the court of appeal should be ordered, on remand, to review that determination.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, the decision of the court of appeals should be reversed and the case should be remanded for a determination of the merits.

June 10, 1985

Respectfully submitted,

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Appendices Follow

Appendix A

United States Court of Appeals

For the District of Columbia Circuit

No 83-1918

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, *et al.*
v.
Raymond J. Donovan, Secretary of the United States Department of Labor, Appellant

No. 83-2082

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, *et al.*, Appellants
v.
Raymond J. Donovan, Secretary of the United States Department of Labor

Appeals from the United States District Court for the District of Columbia
(Civil Action No. 82-01458)

Argued January 25, 1984
Decided October 23, 1984

BEFORE: SCALIA and STARR, *Circuit Judges,* and GESELL,* *District Judge* of the United States District Court for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* SCALIA.

SCALIA, *Circuit Judge:* This case presents two issues pertaining to retraining benefits for workers adversely affected by foreign competition, provided by the Trade Act of 1974: whether, when

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Congress provided a $3.7 billion lump-sum appropriation to the Department of Labor's Employment and Training Administration, "for expenses necessary to carry into effect" the Trade Act training program and four other programs, the Secretary of Labor's decision not to allocate any of that amount to the Trade Act training program is judicially reviewable; and whether the Secretary's approval of training under the original version of the 1974 Act, which conferred no rights to compensation for training costs, was effective as the requisite approval under the 1981 amendments which did confer such rights.

I

The Trade Adjustment Assistance ("Trade Act") Program was created by the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, for the purpose of providing benefits to workers and companies adversely affected by competition from foreign imports. The program was substantially expanded and revised by the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978. The principal benefits provided to workers are trade readjustment allowances ("TRAs"), which supplement state unemployment insurance benefits. *See* 19 U.S.C. §§ 2291-92, 2294 (1982); S. Rep. No. 1298, 93d Cong., 2d Sess. 131, 135-36 (1974).

In 1981, as part of the Omnibus Budget Reconciliation Act ("OBRA"), Pub. L. No. 97-35, 95 Stat. 881, Congress enacted major amendments to the Trade Act of 1974, one aspect of which is the subject of the present litigation. Under the 1974 Act, the Secretary could approve training for a worker when he determined that:

> there is no suitable employment available . . ., but that suitable employment (which may include technical and professional employment) would be available if the worker received appropriate training. . . .

19 U.S.C. § 2296(a) (1976). Although the Secretary was authorized under this section either to "provide" or "assure" the training (authority which he retains under the existing statute, *see* 19 U.S.C. § 2296(a)(1) (1982)), he was not required to do so, nor

was he authorized to reimburse the worker for costs of approved retraining which the worker himself incurred. The incentive for retraining was 26 weeks of "extended" TRAs (beyond the 52 weeks generally available) payable to workers enrolled in approved programs. 19 U.S.C. § 2293(a)(3) (1976). If a worker refused, without good cause, to accept or continue, or failed to make satisfactory progress in, training to which he had been referred by the Secretary under this provision, he lost his entitlement to these supplemental benefits. 19 U.S.C. 2296(c) (1976).

The 1981 amendment revised the worker training provisions in two respects that are relevant here. First, it added to the conditions that had to be met before the Secretary could approve worker training, requiring the Secretary to determine that:

> (A) there is no suitable employment (which may include technical and professional employment) available for a worker,
>
> (B) the worker would benefit from appropriate training,
>
> (C) there is a reasonable expectation of employment following completion of such training,
>
> (D) training approved by the Secretary is available to the worker from either governmental agencies or private sources (which may include area vocational education schools, as defind in section 2461(2) of title 20, and employers), and
>
> (E) the worker is qualified to undertake and complete such training, ...

19 U.S.C. § 2296(a)(1) (1982). If these conditions were met, the statue provided (as it had before) that "the Secretary *may approve* such training." *Id.* (emphasis added). It continued (and this is the second major change): "Upon such approval, the worker shall be entitled to have payment of the costs of such training paid on his behalf by the Secretary." *Id.*

In his instructions regarding implementation of the 1981 amendments to the state employment security agencies ("SESAs") authorized to approve training on his behalf, 19 U.S.C. § 2311, the Secretary directed that training was to be

approved only if, in addition to other requirements, "[s]ufficient funds allocated to pay the costs of such training are available. A State agency shall not approve training for a worker when funds to be expended for this purpose would exceed the amount allocated by the Secretary." Dept. of Labor, General Administration Letter No. 4-82 at 7 (Nov. 13, 1981). In other words, the SESAs were to operate on a "funds available" basis and were not to approve any training whose costs would exceed their fund allocations.

Congress did not enact an appropriations bill for the Department of Labor for fiscal year ("FY") 1982. As a result, the Department operated throughout the year under a series of four continuing resolutions.[1] The first of these—passed on October 1, 1981 and set to expire on November 20, 1981—contained a general funding provision at an annual level of approximately $3.7 billion for the Department's Employment and Training Administration ("ETA"), which administers the Trade Act program along with many other programs. Specifically, the Joint Resolution appropriated funds at the lower of the current rate or the appropriation foreseen in the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Act of 1982, which at that point had passed the House but not the Senate. *See* Act of Oct. 1, 1981, § 101(a)(1), (3), Pub. L. No. 97-51, 95 Stat. 958, 958-59 (1981). Since the 1982 Act, which provided an appropriation of $3.671 billion, was $3.472 billion below the 1981 appropriation, H.R. Rep. No. 251, 97th Cong., 1st Sess. 6 (1981), it was the governing referent. In full relevant part, the Appropriation Act provided as follows:

> For expenses necessary to carry into effect the Comprehensive Employment and Training Act of 1973, as amended, sections 236, 237, and 238 of the Trade Act of 1974, as amended (19 U.S.C. 2101), section 51 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 51), sections

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[1] Act of Oct. 1, 1981, Pub. L. No. 97-51, 95 Stat. 958 (1981); Act of Nov. 23, 1981, Pub. L. No. 97-85, 95 Stat. 1098 (1981); Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183 (1981); Act of Mar. 31, 1982, Pub. L. No. 97-161, 96 Stat. 22 (1982).

> 210, 211, and 212 of Public Law 95-250, and the Veterans' Employment and Readjustment Act of 1972, as amended (38 U.S.C. 2003A), including the purchase and hire of passenger motor vehicles, the construction, alteration, and repair of buildings and other facilities, and the purchase of real property for training centers as authorized by the Comprehensive Employment and Training Act of 1973, as amended, $3,671,129,000 plus reimbursements, of which $2,001,000 shall be for the National Commission for Employment Policy: *Provided,* That no funds from any other appropriation shall be used to provide meal services at or for Job Corps centers.

H.R. 4560, 97th Cong., 1st Sess. 2-3 (1981).

When FY 1982 opened, the Secretary decided to allocate no funds to Trade Act training out of the ETA account. The second continuing resolution, which merely extended the first resolution's expiration date from November 20 to December 15, 1981, provided no new directives. Act of Nov. 23, 1981, Pub. L. No. 97-85, 95 Stat. 1098 (1981). In the third continuing resolution, Congress expressly provided $25 million for the Trade Act program. Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183, 1185 (1981): "In addition to any sums otherwise appropriated there is appropriated an additional sum of $25,000,000 which shall be made available for training, job search allowances, and relocation allowances, under sections 236, 237, and 238 of the Trade Act of 1974."

The Secretary allocated this $25 million to Trade Act training, job search and relocation, but he allocated the entire original $3.7 billion ETA appropriation to other authorized programs. Congress made no further ETA or Trade Act appropriations for FY 1982; the fourth and final continuing resolution merely extended the third resolution from its expiration date (March 31, 1982) to the end of the fiscal year. Act of Mar. 31, 1982, Pub. L. No. 97-161, 96 Stat. 22 (1982). The Secretary maintained his Trade Act training allocation at $25 million and, through the SESAs, paid for training as many qualified applicants as that level of funding would permit.

Plaintiffs in this action were the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") and five individual union members. Four of these individuals had enrolled in training courses approved under the pre-amendment standards, and had incurred expenses attributable to those courses after October 1, 1981; they asserted that they were not reimbursed for those expenses. The fifth individual plaintiff alleged that she met the post-amendment criteria for training approval, and that her October 9, 1981 application for such approval was rejected by a SESA on the sole ground that no funds were available. The union sued on behalf of its members who were similarly situated to both categories of individual plaintiffs. The District Court correctly determined that at least one of the individual plaintiffs had standing to bring each of the complaints in this suit. We need not, therefore, consider whether the UAW had standing.[2] The complaint sought declaratory and injunctive relief for the Secretary of Labor's allegedly wrongful withholding of training benefits under the Trade Act by: (1) refusing to reimburse training costs incurred after October 1, 1981 by workers who had received approval for training under the old program before October 1, 1981; and (2) allocating an unreasonably small sum for the program.[3]

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[2] In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Donovan*, No. 83-2026, slip op. (D.C. Cir. Oct. 23, 1984), it was necessary to consider separately the standing of the union because its claim was arguably not subject to the defense which resulted in the judgment against the individual plaintiffs—*i.e.*, the joinder requirement derived from 19 U.S.C. § 2311(d) held applicable to individual claims for reopening of SESA denials of awards. (Such a defense was neither raised nor considered in the present appeal.)

[3] The complaint also claimed that the Secretary wrongfully failed to pay extended TRA benefits under the amended Act to workers who had continued to be enrolled after October 1, 1981 in training programs approved (under the former standards) prior to that date. That issue is no longer in the case. Similarly, appellees have not appealed the district

On cross-motions for summary judgment, the District Court entered judgment for the plaintiffs, finding for the Secretary on the first issue but against him on the second. It entered an order requiring the Secretary, through the SESAs, to conduct *de novo* approval determinations for (1) workers in previously approved training programs who incurred but were not reimbursed for training expenses after October 1, 1981, and (2) workers who applied for training approval after October 1, 1981, were denied approval on the basis of insufficient funds, and incurred unreimbursed training expenses. The approval was still to be on a "funds available" basis, but the District Court directed the Secretary to make the following funds available, out of amounts which had lapsed to the Treasury at the conclusion of FY 1981 from appropriations originally usable for Trade Act training purposes:[4] up to $85,120,000 for training reimbursements; up to $33,933,000 for extended benefits; up to $4,976,000 for SESA administrative expenses. We have before us the government's appeal and the plaintiffs' cross-appeal from the District Court's disposition.

II

The District Court agreed with the plaintiffs on the question of funding level, holding that the Secretary acted unreasonably in allocating to Trade Act training only the $25 million additional appropriation made by the third continuing resolution. It was this holding that formed the basis for its order directing allocation of funds and approval determinations on the basis of availability of such funds.

The Secretary argues that his allocation "was a conscientious compliance with Congress' manifest intentions for the program in

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court's rejection of their contention that it was unlawful for the Secretary to approve workers for training (through SESAs) only on a "funds available" basis.

[4] The Secretary vigorously contests whether the designated funds were in fact usable for the specified purposes. In light of our disposition of the case this issue need not be resolved.

FY 1982." Appellant's Brief at 33. That may be so. The legislative history shows at least a congressional realization, if not a congressional intent, that nothing would be expended for Trade Act training out of the $3.7 billion lump-sum appropriation. On October 6, 1981, Representative Donald Pease, a supporter of Trade Act training, proposed an unsuccessful amendment to earmark $20 million of the $3.7 billion for Trade Act training. In introducing it, he said:

> [T]he executive branch did not request any funding in fiscal year 1982 for employment training under the Trade Act until last Wednesday—the last day of the outgoing fiscal year. At that late date, the request for approximately $98.6 million could not be factored into the difficult task the Appropriations Committee performed in stretching far fewer training dollars to cover competing needs. Work had been completed on this bill [Labor-HHS appropriation bill] and it had even been scheduled for floor debate.
>
> Currently there are no funds provided in this bill (H.R. 4560) [Labor-HHS appropriation bill] for employment training in what remains of the trade adjustment assistance (TAA) program. We must act to insure that the Reagan administration follows through on its commitment to fund training for thousands of unemployed workers who have lost their jobs in America's basic industries.
>
> . . . .
>
> I realize that many public service employment and job programs are being cut back by 40, 50 percent, and even 60 percent. I share the concern of many of my colleagues about the devastating human impact of these cuts. But unless we act, the TAA training program will be cut out altogether.

127 CONG. REC. H7088-89 (daily ed. Oct. 6, 1981). During Senate debate on the second continuing resolution, efforts were made to add the $98 million requested by the President for Trade Act training. 127 CONG. REC. S13719-25 (daily ed. Nov. 19,

1981). Senator John Danforth, who proposed the amendment, stated:

> The administration's September budget request for the Employment and Training Administration in the Department of Labor specifically included . . . $98.6 million . . . for additional training, job search, and relocation assistance for TAA recipients.
>
> Unfortunately, the request arrived after the Labor subcommittee had marked up the appropriation and was never considered by the committee. . . .
>
> Now we are faced with a situation where authorization exists for additional training, but the funds are not included in the continuing resolution.
>
> . . . .
>
> [W]e find that in the measure that is before us, in the reconciliation bill, the amount for retraining is not there. Therefore, the effect of not having it there is that . . . in essence, we gut the whole thrust of the administration's program. So what is at stake is the program of the administration in trade adjustment assistance.

Id. at S13719-20. Senator Daniel P. Moynihan, who also supported the amendment, said: "Although this administration has requested $98.56 million for training, job search, and relocation assistance for workers in the trade adjustment assistance program, no such funds are included in this resolution." *Id.* at S13722. The amendment failed, *id.* at S13724-25, but a $50 million amendment was passed by the Senate later that same day. Even that did not survive in the final bill, *see* Act of Nov. 23, 1981, Pub. L. No. 97-85, 95 Stat. 1098 (1981), and it was not until the third continuing resolution that, as noted above, a $25 million earmarked appropriation was enacted.

This legislative history is relevant to our inquiry—but not directly relevant. As the Supreme Court has said (in a case

involving precisely the issue of Executive compliance with appropriation laws, although the principle is one of general applicability): "legislative intention, without more, is not legislation." *Train v. City of New York*, 420 U.S. 35, 45 (1975). The issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything—the enactment of legislation. Our focus, in other words, must be upon the text of the appropriation.

Lump-sum appropriations are a common feature of the legislative landscape, and we are not prepared to approach their interpretation by assuming that they are inherently ambiguous, capable of meaning either that no funds *need* be spent on any particular included program, or (as the Secretary seems to assert here) that no funds *could* be spent on a particular one, or that the funds *must* be distributed among all included programs in a given fashion—all as the committee reports and other entrails of legislative history might suggest. We think, to the contrary, that the lump-sum appropriation has a well understood meaning, and that the legislative history described above does not give content to an ambiguous enactment but rather reflects the congressional comprehension of a clear one. A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit.[5]

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[5] An agency may, of course, be constrained to expend a certain portion of a lump-sum appropriation on a particular program because that program establishes a system of statutory entitlements over which the agency has no control. Such a constraint would arise not from the express or implied terms of the lump-sum appropriation itself but from the terms of the substantive statute for which the appropriation was usable. Even then, at least where the entitlement consists of the right to the payment of funds, it may be that the proper remedy is a suit under the Tucker Act, 28 U.S.C. § 1491 (1982), rather than a suit under the APA to compel executive expenditure. *See* 5 U.S.C. § 703 (1982); *cf. Barber v. United States*, 676 F.2d 651 (Ct. Cl. 1982).

Appellees argued below that the Trade Act training program was an entitlement program—*i.e.*, that all those who met the five qualifications

There is ample support for this proposition apart from the legislative history of this specific appropriation. The General Accounting Office, whose "accumulated experience and expertise" in the field of government appropriations, *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971), give special weight to its opinions, has consistently interpreted lump-sum appropriations as creating no requirement that the agency use the money for one project rather than another.

> Congress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for "unforeseen developments, changing requirements, . . . and legislation enacted subsequent to appropriations." . . . This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in Committee reports. However, in order to preserve spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but rather to leave it to the agencies to "keep faith" with the Congress. . . .
>
> On the other hand, when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language.

LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 318, 75-2 CPD ¶ 203 (citation omitted). *See also* B-164031(3), Apr. 16, 1975; B-114833, July 21, 1978; B-202992, May 15, 1981. The same interpretation of the effect of a lump-

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set forth in § 2296(a)(1) *had* to be approved for training. That argument has been abandoned on appeal, quite wisely in light of the statutory language. Apparently the Secretary has paid, out of the $3.7 billion lump-sum appropriation or otherwise, the entitlements to extended TRAs of workers approved for training under the old Act whose training and whose 26-week eligibility continued after October 1, 1981.

sum appropriation appears in congressional statements—for example, the House Appropriations Committee's report on the 1974 Defense Department appropriation bill:

> In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justifications which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills.

H.R. Rep. No. 662, 93d Cong., 1st Sess. 16 (1973), *quoted in* United States General Accounting Office, Office of General Counsel, *Principles of Federal Appropriations Law* 2-27 (1982).

Appellees draw our attention to the following language in the third continuing resolution: *"In addition to any sums otherwise appropriated* there is appropriated an *additional* sum of $25,000,000 which shall be made available for training, job search allowances and relocation allowances." Act of Dec. 15, 1981, § 101(a) (6), 95 Stat. 1183 (1981) (emphasis added). This, they say, clearly indicates Congress's understanding that allocation of funds for Trade Act training had already been mandated and that the $25 million merely supplemented the earlier appropriation. Of course it could indicate such an understanding; but it could just as well indicate that the $25 million specifically earmarked for training was not meant to *preclude* the *discretionary* expenditure of some of the $3.7 billion for that purpose. Since the latter interpretation rather than the former is consistent with the ordinary understanding of lump-sum appropriations, it must be preferred.

Appellees seek support for their position in the so-called impoundment cases, citing *Train v. City of New York, supra; City of Los Angeles v. Adams,* 556 F.2d 40 (D.C. Cir. 1977); *Sioux Valley Empire Electric Association v. Butz,* 504 F.2d 168 (8th Cir. 1974); *State Highway Commission v. Volpe,* 479 F.2d 1099 (8th Cir. 1973); and *National Council of Community Mental*

Health Centers, Inc. v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973). All of these cases, however, involved appropriated funds earmarked for the particular program that the Executive refused to implement or a program which required rather than merely authorized the Executive to confer statutory entitlements. *See* note 5, *supra.* The courts rejected, expressly or implicitly, the existence of "inherent constitutional power in the Executive to decline to spend in the face of a clear statutory intent and directive to do so." *National Council of Community Mental Health Centers, Inc. v. Weinberger, supra,* 361 F. Supp. at 901 (emphasis added). *See also Louisiana v. Weinberger,* 369 F. Supp. 856, 864 (E.D. La. 1973). In the case before us, by contrast, *no* funds have been earmarked for the training program, and the Secretary is *not* required by the substantive statute to approve training for those who meet the conditions of § 2296(a)(1). The only "statutory intent and directive to spend" that can be found here is, at most, a directive to obligate *all* of the $3.7 billion to the ETA programs including $2,001,000 for the National Commission for Employment Policy. It is uncontested that such obligation occurred.[6]

Even if the congressional understanding of the meaning of lump-sum appropriations were not as clear as it is, we would reach the same result. To infer a "reasonable distribution" requirement as appellees would have us do, is to assume that Congress has conferred upon us a task for which we are eminently unsuited and, in all likelihood, constitutionally incompetent. The distribution of public funds among competing social programs is an archetypically political task, involving the application of value

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[6] As noted earlier, there is dispute as to whether the FY 1982 funds remitted to the Treasury which were the subject of the District Court's decree were ever available for Trade Act training purposes. It is uncontested, however, that the fact of their remission was attributable not to the Secretary's failure to obligate them for specific programs, but to the programs' failure, by the end of the fiscal year, to exhaust the available funds.

judgments and predictions to innumerable alternatives, as opposed to the application of accepted principles to a binary determination. This reality is perhaps obscured in the present case by the fact that the District Court's decree pronounced appellees entitled to a quite specific and identifiable allotment: all the 1982 funds usuable for training purposes that were remitted to the Treasury. But the court did not, because it could not, explain why it chose that figure instead of .237 as much—or even 2.37 as much, perhaps forcing other ETA programs to disgorge in later fiscal years some of the $3.7 billion they received in FY 1982. For all the plaintiffs *requested*—all they could *possibly* request, before the court as before the Department of Labor—was that the Secretary "spend a *reasonable portion* of [the $3.7 billion] to implement the program." Brief for Appellees at 35 (emphasis added). If Congress ever clearly places it in our responsibility to decree what "reasonable" amounts should be expended on various programs, there will be time enough to consider how and indeed whether such a task can be performed; but we will assuredly not run out to interpret lump-sum appropriations as constituting such a mandate.

Since, as the above discussion shows, the Secretary was not restricted by law—however much he may have been restricted by political practicality—in allocating the funds in this appropriation among the various programs it covered, we have no jurisdiction to review his determinations. The Administrative Procedure Act provides for judicial review "except to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982). An action is committed to agency discretion so as to preclude judicial review "where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971), *quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). That is precisely the situation here. The first Continuing Resolution appropriates a lump sum of $3.7 billion to a variety of ETA programs. It carefully specifies that $2,001,000 of this shall be for the National Commission for Employment Policy but provides no direction as to how the remainder is to be distributed.

III

Appellees contend in their cross-appeal that the District Court erred in requiring the Secretary (through the SESAs) merely to conduct *de novo* approval determinations (under the 1981 standards and with the total number of approvals presumably limited to the funds made available by the court's opinion) with regard to workers enrolled in approved programs on October 1, 1981. Appellees' position is that the pre-October 1981 approval—even though it was made pursuant to the more lenient standards of the unamended 1974 Act—should be deemed the requisite approval conferring entitlement, under the 1981 amendments, to both payment of extended TRAs (which the Secretary does not contest) and reimbursement of training expenses incurred after the effective date of those amendments. What we have said above renders the cross-appeal moot insofar as it seeks to entitle those workers in pre-October 1981 approved programs to a portion of the funds that the District Court made available. But the complaint asked more generally for a declaratory judgment that those workers are entitled to their post-October 1, 1981 expenses—from whatever funds they may be derived, including, presumably, funds appropriated for Tucker Act relief.[7] It remains necessary, therefore, to address this point.

The plain language of this statute cannot support appellees' interpretation. After reciting the new conditions for training approval, as set forth at page 4, *supra*, the relevant portion of the 1981 amendments provides that if those conditions are met "the Secretary may approve such training for the worker." It immediately continues: "Upon *such* approval, the worker shall be entitled to have payment of the costs of *such* training paid on his behalf by the Secretary." 19 U.S.C. § 2296(a) (1) (1982) (emphasis added). There is no way to avoid the interpretation that the

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[7] Since some of the plaintiffs are individuals whose monetary claims will evidently not exceed $10,000, declaratory judgment as to them will not evade the statutory restriction upon monetary relief in district courts. *See March v. United States*, 506 F.2d 1306, 1309 n.1 (D.C. Cir. 1974). *Kester v. Campbell*, 652 F.2d 13, 15 (9th Cir. 1981).

qualifying approval ("such approval") is approval under the conditions of the 1981 amendments. Plaintiffs who received approval under the old, pre-October 1, 1981, version of the Trade Act did not receive "such" approval as is called for by § 2296(a) (1).

This conclusion is buttressed by the absence from the legislative history of the 1981 amendments of any indication of congressional intent to have prior approved trainees "grandfathered" into the new approval provisions. If that intent existed one would have expected to see it clearly expressed in the statute itself, but it is inconceivable that it would not at least have been reflected in the legislative history. It is not as though approval under the old criteria and approval under the new were essentially interchangeable. To the contrary, the new criteria required, as the old did not, an individualized determination that the worker seeking the training had the ability and interest to benefit from it.

Appellees argue, however, that if the Secretary concedes (as he has) that *extended benefits* are payable under the amended Act on the basis of pre-amendment training approval, he must logically concede that *training expenses* are automatically payable as well. We think not.

Both from the standpoint of the relevant statutory language and from the standpoint of the reasonably discernible congressional intent behind that language, the extended benefit issue and the expense reimbursement issue are quite distinct. The statutory text quoted three paragraphs earlier, containing the critical phrase "such approval," applies only to reimbursement of training expenses. The provision providing for the 26 additional weeks of TRAs, reads as follows:

> [I]n accordance with regulations prescribed by the Secretary, payments may be made as trade readjustment allowances for up to 26 additional weeks in the 26-week period following the last week of entitlement to trade readjustment allowances otherwise payable under this part in order to assist the adversely affected worker to complete training *approved for the worker under section 2296 of this title*. . . .

19 U.S.C. § 2293(a)(3) (1982) (emphasis added). The italicized portion refers to the section which, in the amended Act, contains the new approval requirements. That is also, however, the same section that authorized training approval (under the more lenient standards) in the prior version. *See* 19 U.S.C. § 2296(a) (1976). While we would not normally interpret the reference to include the section prior to its amendement, the language is at least susceptible of that interpretation. And the legislative history indicates this is precisely what was meant. The House Budget Committee report on OBRA clearly states: "For weeks of unemployment beginning after September 30, the worker would be entitled to the remaining number of weeks of basic TRA benefits and any additional weeks of benefits if in training the worker is entitled to *under the current program,* but at the new UI weekly benefit level." H.R. Rep. No. 158, 97th Cong., 1st Sess., Vol. III at 274 (1981) (emphasis added). There is thus good reason in statutory text and legislative history for treating training expenses and extended TRA benefits differently.

We conclude that District Court was correct in refusing declaratory judgment that workers who secured approval under the old § 2296 have approved status for purposes of post-October 1, 1981 reimbursement.

* * * * *

For the reasons discussed, we vacate the order of the District Court and direct the entry of judgment for the defendant.

So ordered.

Appendix B

United States District Court for the District of Columbia

Civil Action No. 82-1458

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al.
Plaintiffs

v.

Raymond J. Donovan, Secretary of the United States Department of Labor
Defendant

[Filed June 10, 1983]

MEMORANDUM OPINION

This action is before the Court on cross-motions for summary judgment. As set forth below, the Court grants plaintiffs' motion and denies defendant's motion.

I. Introduction

The plaintiffs are the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the UAW), and five members: Marian Jackson, Reginald James, Emmett Pompey, Effie Simmons, and Helen Vance. The defendant is the Secretary of the United States Department of Labor, Raymond Donovan (the Secretary).

State employment agencies, acting as the agent of the Secretary, denied the individual plaintiffs' requests for payment of training costs under the Trade Acts of 1974, 19 U.S.C. § 2101 *et seq.*, as amended by Title XXV of the Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35, 95 Stat. 357.

Approximately 650,000 members of the UAW, including the five individual plaintiffs, have been separated from employment due to competition from imports and have been certified by the Secretary as eligible for programs under the trade adjustment assistance program of the Trade Act. The Omnibus Budget

Reconciliation Act of 1981 (the Budget Act) reduced the level and duration of benefits. At the same time, the Budget Act strengthened the training component of the Trade Act by requiring the Secretary to pay dislocated workers the cost of their approved training. Section 2506(2) of the Budget Act, 19 U.S.C. § 2296(a) (Supp. V 1981).

The complaint challenged the Secretary's interpretation of Title XXV of the Budget Act in two respects. First, workers who had received approval for training before October 1, 1981, the effective date of the Budget Act, were denied consideration for payment of their training costs after October 1, 1981. *See* General Administration Letter No. 4-82, § 9(c)(2) (U.S. Dept. of Labor, Employment and Training Administration, November 13, 1981). Second, States were prohibited from approving training when the costs would exceed the amount of funds allocated to them by the Secretary. *Id.*, § 9(c)(1)(g).

Plaintiffs raised a third challenge as a result of discovery. The Secretary refused to allocate to the States monies in addition to a supplemental appropriation of $25 million to pay for approved training of dislocated workers in fiscal year 1982. At the same time, he returned $89 million to the United States Treasury of unused funds for fiscal year 1982 from the Employment and Training Administration account that he concedes could have been used for approved training.

The plaintiffs argue that the Secretary abused his discretion by refusing to spend any monies from this account for approved training. The Secretary maintains that his decision not to spend monies from this account for training dislocated workers was within his absolute discretion. Further, he contends that the unallocated monies in any event are beyond recall.

The Court examines first the Secretary's challenges to the subject matter jurisdiction of the Court and the standing of plaintiffs to bring this action. The resolution of this action on the merits requires analysis of the Trade Act amendments in the Budget Act and the continuing resolutions that funded the Department of Labor in fiscal year 1982.

II. Subject Matter Jurisdiction

The Trade Act authorizes the Secretary on behalf of the United States to enter into an agreement with a State agency. The cooperating State agency, "as agent of the United States," provides payments and refers dislocated workers for training where appropriate. 19 U.S.C. § 2311(a) (Supp. V 1981).

A "determination" by a State agency regarding entitlement to program benefits is subject to review "in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent." 19 U.S.C. § 2311(d) (1976). State law is defined as the unemployment insurance law of the State approved by the Secretary. *Id.*, § 2319(10) (1976).

The Secretary contends that section 2311(d) divests the Court of jurisdiction over this action. The Court disagrees. Despite a similar provision in the unemployment compensation law, 5 U.S.C. § 8502(d) (1976), federal courts have long reviewed challenges under federal statutory and constitutional law to the administration of unemployment compensation programs. *See, e.g., Christian v. New York Department of Labor,* 414 U.S. 614 (1974), *vacating and remanding on other grounds,* 347 F. Supp. 1158 (S.D.N.Y. 1972); *California Human Resources Department v. Java,* 402 U.S. 121 (1971), *affirming,* 317 F. Supp. 875 (N.D. Ca. 1970). Plaintiffs are not seeking review of the individual determinations on their applications for payment of approved training costs. They seek review of the Secretary's interpretation and administration of the amended Trade Act. They claim that the Secretary has violated the Trade Act and the Constitution. In these circumstances, section 2311(d) does not divest the Court of jurisdiction.

III. Standing

The Secretary argues next that the plaintiffs have not shown any injury in fact. The four individual plaintiffs who received approval for training before October 1, 1981, the Secretary contends, did not show they incurred training expenses after that date or requested payment. The Secretary says that Marian

Jackson, the sole plaintiff who applied for training approval after October 1, 1981, did not obtain approval for a reason other than unavailability of funds. And the UAW, the Secretary maintains, has failed to show any of its members were denied reimbursement for training because of the unavailability of funding.

Article III of the Constitution limits the judicial power of the United States to resolving "cases" and "controversies." As part of the case and controversy requirement, "the party who invokes the court's authority [must] show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted). *See also, Havens Realty Corporation v. Coleman*, 455 U.S. 363, 372 (1982); *Common Cause v. Department of Energy*, 702 F.2d 245, 250 (D.C. Cir. 1983).

Contrary to the Secretary's contention, the record shows clearly that three of the four individual plaintiffs who received approval for training before October 1, 1981 expended funds for training and requested payment after that date. Accordingly, plaintiffs have shown the injury in fact required by Article III of the Constitution for their first claim.

Reginald James was separated from employment with Chrysler Corporation on February 6, 1979. He received approval for a training course in welding technology on July 13, 1981. His request for refund for post-October tuition was denied on December 1, 1981. Emmett Pompey was separated from employment with Chrysler Corporation on August 6, 1979. He received approval for a course in auto mechanics on September 29, 1981. The course was scheduled to run from September 22, 1981, until June 1983. His request for post-October reimbursement was denied on December 8, 1981. Effie Simmons was separated from employment with General Motors Corporation on October 12, 1979. She received approval for a training course as a word processing operator on June 22, 1981. The course began immediately thereafter and was to continue until December 8, 1981. Ms.

Simmons' request that the Secretary pay her post-October tuition was denied.

Many persons in approved training before the effective date of the Trade Act amendments, such as Ms. Simmons, had their benefits reduced or terminated and were unable to continue self-financed training. The Trade Act provides for payment of 26 weeks of extended benefits to persons enrolled in approved training. 19 U.S.C. § 2293(a)(1) (1976). The 1981 amendments limited these extended benefits to the 26-week period following the last week of entitlement to regular Trade Act benefits. Section 2505(a)(3) of the Budget Act, 19 U.S.C. § 2293(a)(3) (Supp. V 1981). Plaintiffs have dropped their initial challenge to the Secretary's denial of extended benefits.

The Court finds that Helen Vance, the fourth individual plaintiff who received pre-Budget Act approval, lacks standing. Helen Vance was separated from employment with Ford Motor Company on January 20, 1981. She began a course in business and public administration on June 1, 1981, without obtaining approval of the appropriate State agency. Her subsequent application for approval was denied on September 15, 1981, and she did not appeal. Consequently, she lacks standing to present plaintiffs' first claim.

Plaintiffs' second claim concerns the denial of training approval on the basis of lack of available funds to otherwise eligible workers after October 1, 1981. Marian Jackson is the sole individual plaintiff presenting this claim. Ms. Jackson was separated from employment with Ford Motor Company on August 24, 1979. She applied initially for self-financed training as a medical technician on June 5, 1981. That application was denied on June 24, 1981. Ms. Jackson's appeal resulted in a remand for redetermination on October 27, 1981. Ms. Jackson was informed by letter on December 15, 1981 that her application was being held in abeyance because no money was available. The determination affirming the denial of her application issued on February 26, 1982. The determination, however, referred to extended benefits only. The sole determination regarding approval of Ms. Jackson's costs of training was the December 15, 1981 letter holding her

application in abeyance for lack of funds. Therefore, the Court finds that she has standing to contest the Secretary's challenged policy.

In addition, other UAW members have been denied approval because of the challenged policy. The UAW presented affidavits from two members showing they were denied training approval after October 1, 1981, because of unavailability of funds. Pamela Romero was separated from employment with A.C. Sparkplug in March 1981. She applied for approval of a nursing or physical therapy program in November 1981. Her application was denied because funds for training were frozen. Clifford Tucker was separated from employment with Chrysler Corporation in December 1980. He applied for approval of a program in auto technology to start in September 1981. He was informed throughout the fall of 1981 and the winter and spring of 1982 that no funds were available to pay his costs, and approval was denied.

The Supreme Court has recognized that:

> [A]n association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343 (1977). It is sufficient if one of the association's members has suffered injury as a result of the challenged action. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Here, two UAW members have shown they were injured by the policy under challenge. The interest of the UAW in encouraging retraining and re-employment of its members is manifest. There is no necessity for additional individual plaintiffs in order to elucidate the challenged policy of the Secretary or to frame appropriate relief. Accordingly, the UAW has associational standing as the representative of Pamela Romero, Clifford Tucker, and other members denied approval for training after October 1, 1981 because no funds were available.

Unemployed UAW members who have been denied approval for training drain union resources. The UAW has devoted significant efforts and funds to aiding dislocated workers. It has an organizational interest in promoting reemployment and retraining of such members. Therefore, the UAW has standing in its own right to contest the Secretary's policy of denying approval of training in fiscal year 1982 on the basis of insufficient allocated funds. *See Havens Realty Corporation v. Coleman,* 455 U.S. 363, 378-79 (1982).

IV. The Merits

A. *The Statutory Scheme*

The Trade Act of 1974 authorized the Secretary to approve training of a worker eligible for trade adjustment assistance. The Secretary could approve training if he determined that (1) there was "no suitable employment available" for the worker, and (2) "suitable employment . . . would be available if the worker received appropriate training." 19 U.S.C. § 2296(a) (1976).

The 1981 amendments made two changes. First, Congress refined the requirement that suitable employment be available after training. The Secretary now must determine the worker would benefit from the training, there is a reasonable expectation of employment following completion of such training, the training approved is available to the worker from either governmental agencies or private sources, and finally, the worker is qualified to undertake and complete the training. Section 2506(2) of the Budget Act, 19 U.S.C. § 2296(a) (1) (B)-(E) (Supp. V 1981). The second change was that upon approval, the worker becomes entitled to have payment of the costs of such training paid on his behalf by the Secretary. *Id.,* § 2296(a) (1).

B. *Workers Approved for Training Before October 1, 1981*

The Secretary interpreted the 1981 Trade Act amendments to exclude workers approved for training before October 1, 1981, the effective date of the amendments. That interpretation, although

accorded a presumption of correctness, is clearly erroneous in this Court's view.

The Secretary observed correctly that the new criteria for training approval require a more exhaustive and focused inquiry than the old, simpler standard where the Secretary did not have to foot the bill. However, regulations existing at the time the Budget Act passed and relevant legislative history show that Congress did not intend to preclude workers in training on October 1, 1981 from receiving approval under the new criteria.

Section 2514(a)(1)(C) of the Budget Act, codified at 19 U.S.C.A. § 2291 note (1983 Supp.), provides in relevant part that the amendments "shall take effect with respect to determinations regarding training . . . that are made or filed after September 30, 1981." At the time the Budget Act passed, 29 C.F.R. § 91.6 (1980) provided that "[d]eterminations with respect to an application shall be made at any time to the extent necessary to establish or protect an individual's entitlement to TRA (Trade Act Assistance)." The Conference Report on the Budget Act stated that the provisions for "training and other employment services" would be "effective for registrations for services . . . made or filed after September 30, 1981." H.Rep. No. 97-208, 97th Cong., 1st Sess. 1003 (1981). The conferees' adoption of this language indicates Congress's intention that certified workers who had received training approval within the statutory time limits could register for training and other employment services after September 30, 1981. Plaintiffs James, Pompey and Simmons appealed determinations denying them post-October training costs. Those requests and determinations were made after October 1, 1981. The Court concludes that Congress intended to give "determinations" in the Trade Act amendments the same meaning it had in the contemporary regulations.

The court does not accept plaintiffs' conclusion that workers in the position of James, Pompey, and Simmons were entitled to payment of training costs incurred after October 1, 1981. In the first place, the statute says the Secretary "may approve" training. Second, the legislative history shows why Congress used "may."

The House version of the Trade Act amendments made training an entitlement once the Secretary determined an eligible worker passed the five criteria. H.R. 3982, Union Calendar No. 109 (June 19, 1981) at 260; H.Rep. No. 97-158, 97th Cong., 1st Sess. 275 (1981); Cong. Rec. H 3514 (daily ed. Jun. 25, 1981). The conferees rejected the mandatory language, changing "shall approve" to "may approve." H.R. 3982, Calendar No. 188 (Jul. 8, 1981) at 440. The Conference Report recognized the change by noting that the Secretary "must provide and pay training costs *if* he approves training." H.Rep. No. 97-208, 97th Cong., 1st Sess. 1003 (1981) (emphasis added).

Nevertheless, the Secretary wrongfully deprived workers in approved training on October 1, 1981 of the opportunity to obtain a favorable determination.

Plaintiffs argued that the Secretary's refusal to pay post-October 1981 costs of training for workers already enrolled in training violated the equal protection clause of the Fifth Amendment of the Constitution by establishing an irrational classification. The Court need not resolve the constitutional issue in view of the resolution of plaintiffs' statutory claim.

C. Workers Denied Approval for Training After October 1, 1981

1. The Sixth Condition

The Court agrees with the Secretary that requiring the availability of "[s]ufficient funds allocated to pay the costs of training" does not, on its face, violate the Trade Act. It is a reasonable condition, if applied reasonably. Congress did not establish training as an entitlement, and it could not require the Secretary to spend more than the amount available.

2. *Availability of Funds*

The Secretary contends that when Congress omitted the President's request of $112 million (reduced to $98 million) for training from the Budget Act, and failed to designate funds specifically for training in the first continuing resolution of fiscal

year 1982, it permitted him to ignore the training program entirely.

The Court disagrees with the Secretary's view. In contrast to Congress's change of "shall" to "may," there is no evident explanation why Congress deleted the requested amount. Thus, the Court hesitates to infer anything from the deletion. *See State Highway Commission of Missouri v. Volpe,* 479 F.2d 1099, 1116-17 (8th Cir. 1973) (cautioning against interpreting statute by rejected amendments or other bills when reasons for rejection are not clear).

The 1981 Trade Act amendments "authorized to be appropriated to the Department of Labor, for each of fiscal years 1982 and 1983, *such sums as may be necessary to carry out the purposes of this chapter."* Section 2510 of the Budget Act, 19 U.S.C. §2317 (Supp. V 1981) (emphasis added) (the code compilers changed "chapter" to "part," but it is undisputed that the term encompassed all Trade Act benefits, including training).

The Conference Report noted that the House bill would have authorized "such sums as may be necessary, except that *no less than* $112 million for each of fiscal years 1982 and 1983 is authorized for training, job search, and relocation allowances and 5 percent for program evaluation." H.Rep. No. 97-208, 97th Cong., 1st Sess. 1004 (1981) (emphasis added). The Senate amendment would have authorized "such sums as may be necessary for each of fiscal years 1982, 1983, and 1984." The conferees followed the Senate "with respect to the amount authorized" and the House bill limiting authorization to fiscal years 1982 and 1983. *Id.* It can be said with confidence only that Congress did not intend to require the Secretary to spend a minimum of $112 million on training, job search, and relocation allowances.

This Court faced a similar problem of interpretation in *Rocky Ford Housing Authority v. United States Department of Agriculture,* 427 F. Supp. 118 (D.D.C. 1977). In *Rocky Ford,* the conference committee rejected the Senate's bill requiring $6 million to be spent for a rural rent supplement program. The conferees instead authorized to be appropriated "such amounts as

may be necessary" to carry out a rental assistance program. The *Rocky Ford* Court found an unequivocal intent that the program be implemented. The Secretary of Agriculture had substituted another program for the one under review because of budgetary considerations. The Court held this action an abuse of discretion. *Id.*, at 132-33.

The Secretary of Labor denies that Congress required him to spend anything on training when it authorized to be appropriated "such amounts as may be necessary to carry out the purposes of this chapter." The legislative history of the 1981 Trade Act amendments is filled with expressions of intent by the Secretary that the Administration intended to spend approximately $100 million on training for workers in fiscal year 1982 if the proposed amendments passed. *See* S.Rep. No. 97-139, 97th Cong., 1st Sess. 535 (1981); S.Rep. No. 97-103, 97th Cong., 1st Sess. 4 (1981); Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1982: Hearings Before a Subcommittee of the House Committee on Appropriations, 97th Cong., 1st Sess. 66, 156 (May 5-6, 1981); Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for Fiscal Year 1982: Hearings Before a Subcommittee of the Senate Committee on Appropriations, 97th Cong., 1st Sess. 647-48 (April 7, 1981); Trade Adjustment Assistance for Workers, Firms, and Communities: Hearings Before the Subcommittee on Trade of the House Committee on Ways and Means, 97th Cong., 1st Sess. 11, 36 (March 30-31, 1981) (Trade Adjustment Assistance Hearings). The Senate Committee report recognized its amendments, which did not contain the $112 million floor, would "strengthen the training, job search, and relocation aspects of the (Trade Act) program proposals." S.Rep. No. 97-139, 97th Cong., 1st Sess. 535 (1981).

Appropriations requests by the Executive and statements by Congressional committees do not bind Congress. *Demby v. Schweiker,* 671 F.2d 507, 510-11 (D.C. Cir. 1981), citing *TVA v. Hill,* 437 U.S. 153, 191 (1978). To effectuate the statutory

design, Congress must have intended that the Secretary exercise reasoned discretion in funding the training program.

The Secretary admits that funds were available for allocation to training under the four continuing resolutions appropriating funds for the Department of Labor through fiscal year 1982. *See* H.J. Res. 325, Pub.L. No. 97-51, 95 Stat. 958 (Oct. 1, 1981); H.J. Res. 368, Pub.L. No. 97-85, 95 Stat. 1098 (Nov. 23, 1981); H.J. Res. 370, Pub.L. No. 97-92, 95 Stat. 1183 (Dec. 15, 1981); H.J. Res. 409, Pub.L. 97-161, 96 Stat. 22 (Mar. 31, 1982); November 10, 1982 declaration of Sandra T. King, Budget Officer, Employment and Training Administration (ETA), Department of Labor.

The Secretary contends, however, that he was required to spend only $25 million on training, job search allowances, and relocation allowances by the following provision in Pub.L. No. 97-92:

> *In addition to any sums otherwise appropriated,* there is appropriated an *additional* sum of $25,000,000 which shall be made available for training, job search allowances, and relocation allowances under sections 236, 237, and 238 of the Trade Act of 1974.

Id., § 106(a)(6) (emphasis added).

The plain language of section 101(a)(6) provides that the $25,000,000 is an "additional sum." It is a cardinal principle of statutory construction that interpretations should be favored that "give effect to every provision of a statute so that no part is rendered inoperative or superfluous, void or insignificant." *Public Citizen Health Research Group v. Food and Drug Administration,* No. 82-1745, slip op. at 9 (D.C. Cir., Apr. 15, 1983), quoting 2A C. Sands, Statutes and Statutory Construction § 46.06 (4th ed. 1973).

Rep. Conte, the author of the amended H.J. Res. 370 that became Pub. L. No. 97-92, noted on the floor of the House that the provision "adds $24 million for adjustment and training activities." Cong. Rec. H9120 (daily ed. Dec. 10, 1981) (the amount was later changed to $25 million). Senator Hatfield, the

Chairman of the Senate Appropriations Committee, said in discussing the 4 percent across-the-board cut proposed in the resolution: "We are trying to protect programs rather than empower the administration with authority to impound or to destroy or strangle programs." Cong. Rec. S14965 (daily ed. Dec. 10, 1981); *id.*, at S14962. The Secretary's policy left the States in the unconscionable position of telling workers that the Secretary would pay for approved training, without advising them that he had not allocated funds available to implement them.

The Court concludes that the $25 million appropriation for training, relocation, and job allowances was in addition to amounts appropriated that were to be spent according to the Secretary's exercise of reasoned discretion.

3. Judicial Review of the Secretary's Refusal to Allocate Money Other Than the $25 Million Appropriation

The Secretary argues that his decision not to spend money on training from the Employment and Training Administration (ETA) $3.8 billion appropriation is unreviewable as a decision committed to agency discretion by law under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976). He points out that most of the cases cited by plaintiffs where courts ordered agencies to spend money involved appropriations for designated programs in specific amounts or program terminations. *See, e.g., Commonwealth of Pennsylvania v. Weinberger,* 367 F. Supp. 1378 (D.D.C. 1973); *Guadamuz v. Ash,* 368 F. Supp. 1233 (D.D.C. 1973).

The Secretary was not required to spend all funds appropriated to the Department of Labor in the continuing resolutions. This does not, however, endow him with the authority to use unfettered discretion as to when and how the monies may be used. A report from the Senate Appropriations Committee report in November 1981 stated, for example, that "the committee expects the Secretary will use a reasonable amount of available funds for projects that will assist displaced workers return to self-sustaining productive employment through retraining, relocation and related activities . . ." S.Rep. No. 97-268, 97th Cong., 1st Sess. 10 (1981)

(Report on Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Bill, 1982).

The use of "may" in the authorization for appropriations and in the continuing resolution, in light of the legislative history of the 1981 Trade Act amendments, did not give the Secretary discretion to refuse to make funds available for a congressionally mandated training program. *See Commonwealth of Pennsylvania v. Lynn,* 501 F.2d 848, 854 (D. C. Cir. 1974; *State Highway Commission of Missouri v. Volpe,* 479 F.2d 1099, 1109 (8th Cir. 1983); *cf. United States v. Lucille Mitzi Bosco Rodgers,* 51 U.S.L.W. 4621, 4629-30 (May 31, 1983).

The agency discretion by law provision of the APA applies to the rare instances where there is no law to apply. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410 (1971).That pragmatice determination is made by evaluating three factors: "the need for judicial supervision to safeguard the interests of the plaintiffs; the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and the appropriateness of the issues raised for judicial review." *Natural Resources Defense Council v. Securities and Exchange Commission,* 606 F.2d 1031, 1044 (D.C. Cir. 1979). The need to ensure that the Secretary exercises a reasoned discretion in funding and operating the training program enacted by Congress, together with the strong presumption of judicial review, compel the court to reject the Secretary's argument of unreviewability.

V. Remedy

A. *Mootness*

Although the parties have not raised the issue of mootness, the Court addresses it since fiscal year 1982 has passed. Assuming *arguendo* that any funds available have lapsed, this action is not made moot because the Secretary's actions, in the context of the litigation process, are "capable of repetition, yet evading review." *Roe v. Wade,* 410 U.S. 113, 124-25 (1973); *Batterton v. Marshall,* 648 F.2d 694, 699 (D.C. Cir. 1980). In addition, a court may grant a declaratory judgment even though it declines to issue

an injunction or writ of mandamus. *Powell v. McCormack,* 395 U.S. 486, 499 (1969); *State Highway Commission of Missouri v. Volpe,* 479 F.2d, at 1103. Defendant bears the burden of demonstrating that there is no reasonable expectation that the wrong will be repeated. *Williams v. Barry,* No. 82-1792, slip op. at 5 (D.C. Cir. Jun. 3, 1983).

B. *Injunctive Relief*

Courts have power to order that funds be held available beyond their statutory lapse date if equity so requires. *State of Connecticut v. Schweiker,* 684 F.2d 979, 997 (D.C. Cir. 1982), *cert. denied,* U.S. , 103 S.Ct. 1197 (1983). That power exists where, as here, suit was filed before budget authority lapsed. *Id.; National Association of Regional Councils v. Costle,* 564 F.2d 583, 588-90 (D.C. Cir. 1977).

By statute, the mandated return of an appropriation or fund to the Treasury at the end of a definite period "does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance." 31 U.S.C.A. §1502(b) (1983). In fact, the head of an agency has the power to restore to the appropriate account part of a withdrawn, unobligated balance that has reverted to the Treasury where he decides that it is required "to pay obligations and make adjustments." *Id.* §1552(a) (2).

The Secretary's answers to interrogatories and the affidavits of ETA Budget Officer Sandra T. King indicate that funds exist for Trade Act training from at least two sources.

The first source is the $89 million (less $4 million designated for the Job Corps by Congress) of unobligated federal funds in the ETA account for fiscal year 1982. The second source is the gap between the appropriated amount of $306 million for the Federal unemployment benefit account (FUBA), and the total amount obligated to the States from the FUBA account—$75 million. The Secretary's claim that FUBA money cannot be used or transferred to pay for training costs is belied by the legislative history of the Budget Act.

The $112 million proposed originally by the Secretary for training was contained in the FUBA account. The Secretary's representative told a Congressional committee in March 1981:

> What we intend to do is this, if the Congress enacts the (Trade Act amendments), which we certainly hope it does, we would immediately move forward with a budget amendment. For now, the $112 million I mentioned *is provided for in the Federal unemployment benefit account—FUBA. We would probably reduce the FUBA account by that amount in budget amendment and go to some other authorization.*

Trade Adjustment Assistance Hearings, at 36 (testimony of William B. Lewis, Administrator, Unemployment Insurance Service, Employment and Training Administration, Department of Labor). (emphasis added).

The Court permits plaintiffs to take the deposition of Budget Officer Sandra T. King and the deposition of any other appropriate budget officer of the Department of Labor within 10 days of the date of this order to ascertain the availability of fiscal year 1982 funds for training dislocated workers under the Trade Act.

The Court requires the Secretary, exercising his reasoned discretion, to provide to the Court within 25 days of the date of this order a plan of funding Trade Act training costs from available fiscal year 1982 funds other than the $21.4 million obligated in fiscal year 1982 for Trade Act training. The plan shall include a method of permitting applications by persons, such as plaintiffs James, Simmons, and Pompey, who obtained approval for training before October 1, 1981, and whose requests for payment of costs after October 1, 1981 were denied. The plan shall also include a method of permitting application by persons, such as plaintiff Jackson, and declarants Romero and Tucker, who were denied initial approval for training during fiscal year 1982 for lack of sufficient allocated funding.

The Secretary has carried over $5.4 million in unobligated fiscal year 1982 funds for training to fiscal year 1983. The same treatment is possible for funds that would have been obligated in fiscal year 1982 under a reasoned exercise of agency discretion.

Since authorization for Trade Act training expires at the end of fiscal year 1983 under Section 2510 of the Budget Act, 19 U.S.C. § 2317 (Supp. V 1981), the Court will not grant extensions.

An appropriate order accompanies this opinion.

/s/ JUNE L. GREEN
U.S. District Judge

June 10, 1983

United States District Court for the District of Columbia

Civil Action No. 82-1458

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al.
Plaintiffs

v.

Raymond J. Donovan, Secretary of the United States Department of Labor
Defendant

[Filed June 10, 1983]

ORDER

Upon consideration of defendant's motion for summary judgment, plaintiffs' reply and cross-motion for summary judgment, defendant's opposition, plaintiffs' reply, and the entire record in this action, for the reasons stated in the accompanying memorandum opinion, it is by the Court this 10th day of June 1983,

ORDERED that plaintiff Helen Vance is dismissed from this action for lack of standing; it is further

ORDERED that plaintiffs' motion is granted and the Secretary's motion is denied in that it is declared that the Secretary abused his discretion in refusing to allocate funds for Trade Act training from the continuing resolution appropriations of Congress in fiscal year 1982 for the Department of Labor; it is further

ORDERED that the stay of discovery in this action is vacated to permit plaintiffs to take the deposition of Sandra T. King, Budget Officer of the Employment and Training Administration of the Department of Labor, and the deposition of any other appropriate budget officer of the Department of Labor, within 10 days of the date of this order to ascertain the availability of fiscal year 1982 funds for Trade Act training; it is further

ORDERED that the Secretary, exercising his reasoned discretion, shall provide to the Court within 25 days of the date of this order a plan of funding training costs of dislocated workers under

the Trade Act from available fiscal year 1982 funds other than the $21.4 million obligated in fiscal year 1982 for such training; and it is further

ORDERED that this action is dismissed with the Court retaining jurisdiction to enter appropriate injunctive relief upon submission of the Secretary's plan.

/s/ JUNE L. GREEN
U.S. District Judge

Appendix C

United States District Court for the District of Columbia

Civil Action No. 82-1458

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al.
Plaintiffs

v.

Raymond J. Donovan, Secretary of the United States Department of Labor
Defendant

[Filed Aug. 15, 1983]

MEMORANDUM ORDER

This action is before the Court for the entry of appropriate injunctive relief in accordance with the Court's memorandum opinion and order of June 10, 1983. The Court has considered with care the renewed motion for reconsideration or clarification by the Secretary of Labor (Secretary), the Secretary's plan submitted pursuant to the order of June 10, 1983, and the plaintiffs' alternative plan. In framing appropriate injunctive relief, the Court reviews first the availability of funds and then the terms of relief.

1. Availability of Funds

The Secretary's abuse of discretion, as determined by the Court, was his refusal to allocate funds for Trade Act training from the continuing resolution appropriations of Congress in fiscal year 1982 for the Department of Labor other than Congress's supplemental appropriation of $25 million. *See* order of June 10, 1983, ¶ 2; memorandum opinion of June 10, 1983, at 20, 21.

Nevertheless, the Secretary contends his error lay only in returning money to the Treasury rather than spending such money on Trade Act training. *See* defendant's reply memorandum in support of motion for reconsideration, clarification and stay, at 3. Under the Secretary's reasoning, only $2 million, which

lapsed to the Treasury from "Other National Programs" source code for special national programs and activities, would be available to fund injunctive relief. This narrow characterization of the Court's holding is in error, for the Court noted specifically that the Secretary was not required to spend all funds appropriated. Memorandum opinion, at 21. The secretary lacked discretion, the Court found, to ignore a congressionally mandated program at the expense of other programs.

The record reflects clearly that $85,120,000 in federally unobligated fiscal year (FY) 1982 funds from the Employment and Training Assistance (ETA) appropriation for the Department of Labor is available for the satisfaction of valid obligations incurred in FY 1982. While these funds were allocated originally to other programs, upon their deobligation during FY 1982, they became available to meet valid obligations, including Trad[e] Act training. 31 U.S.C.A. §§ 1502(b), 1552(a)(2) (1983); deposition of Sandra T. King, Budget Officer for the Department of Employment and Training Administration, Department of Labor (King Deposition), at 63-66, 77 (June 20, 1983).

The Court agrees with the Secretary that the $33,933,000 in federally unobligated funds from the Federal Unemployment Benefits and Allowances (FUBA) account in fiscal year 1982 are not legally available for payment of training costs. The Court cited the congressional testimony of William Lewis, currently Administrator of the Office of Employment Security in the ETA, to illustrate the Secretary's expressed determination to spend increased funds available for Trade Act training if the Administration's proposed amendments to reduce benefits passed. Those amendments passed, but the Secretary nonetheless refused to spend funds available during FY 1982 on Trade Act training, other than the $25 million supplemental appropriation. In view of the overwhelming weight of the legislative history, it is not material that one congressional report relied upon by the Court, S. Rep. No. 97-268, 97th Cong., 1st Sess. 10 (1981), may have referred to non-Trade Act training programs.

Additionally, $4,976,000 in federally unobligated FY 1982 funds was returned to the U.S. Treasury. These funds were

appropriated for state administrative expenses relating to the unemployment insurance and employment services systems, including administration of trade adjustment assistance programs, and are available for any valid FY 1982 obligation. King Deposition, at 51, 78, 81.

2. Terms of Injunctive Relief

The injunctive relief ordered by the Court aims to reimburse actual costs expended by individuals who would have likely received training approval if the Secretary had allocated available funds. Relief is not provided to individuals who failed to apply for training approval under the Trade Act. Relief to such persons is simply too speculative. The Court declines to recreate a training program. That would exceed the scope of appropriate judicial relief. Rather, the Court frames the remedy to compensate individuals for identifiable personal obligations incurred by them in FY 1982 which the Trade Act training program, if administered properly, would have likely absorbed. Accordingly, the Secretary, through participating state employment service agencies (SESAs) shall make approval determinations *de novo* for eligible individuals using existing guidelines.

Where determinations are made to reimburse actual expenditures or personal obligations for training costs incurred in FY 1982, the Secretary, through participating SESAs, shall also consider payment from FUBA account funds of up to 26 weeks of extended Trade Act benefits that are otherwise payable for weeks of approved training under 19 U.S.C. § 2293(a) (Supp. V 1981). To effectuate such relief, the eligibility date for purposes of the 26 weeks of extended benefits shall be "the 26 week period following the last week of entitlement to trade readjustment allowances," without regard to the fact that this period has long since passed. *Id.* § 2293(a)(3). In many cases, the Secretary's failure to spend available funds for training led inevitably to the denial of extended benefits. It would be inequitable to permit the Secretary's error to foreclose extended benefits that are otherwise payable.

The Secretary need not award weeks of extended benefits where the previous denial was due to untimely application.

Further, persons who have received extended benefits or have obtained reimbursement for their training costs from other public sources are not entitled to relief. These individuals have not suffered any harm from the Secretary's failure to spend available funds on training. The Court expects that the available FY 1982 funds—$85,120,000 for reimbursement of training costs; $33,933,000 for extended benefits; and $4,976,000 for state administrative expenses—will be more than sufficient to satisfy the relief ordered.

Accordingly, upon consideration of the plan submitted by the Secretary, the Secretary's renewed motion for reconsideration or clarification, plaintiffs' opposition thereto and alternative plan, and the entire record in this action, for the reasons expressed above, it is by the Court this 15th day of August 1983,

ORDERED that the Secretary's renewed motion for reconsideration or clarification is granted to the extent that the funds in the Federal Unemployment Benefits and Allowances (FUBA) account are held not available for Trade Act training reimbursement; it is further

ORDERED that the Secretary's renewed motion for reconsideration or clarification is denied in all other repects; it is further

ORDERED that the Secretary, within 45 days of the date of this order, shall notify all state employment service agencies (SESAs) acting as the Secretary's agent in processing applications for benefits and training under the Trade Act, that individuals in the following categories may be eligible for relief as a result of this case:

(1) individuals who were enrolled in training approved under the Trade Act on October 1, 1981, and who expended funds or incurred personal obligations for costs of that training in fiscal year (FY) 1982, and were not reimbursed by the Secretary or any other public source;

(2) individuals who applied for training approval under the Trade Act after October 1, 1981, were denied approval on the

basis of insufficient funds, and expended funds or incurred personal obligations in FY 1982 for costs of training which have not been reimbursed by any public source; it is further

ORDERED that the Secretary, within 45 days of the date of this order, shall direct all participating SESAs to identify individuals who are within these categories from agency records; undertake all reasonable efforts to notify these individuals by writing to their last known address and advertising in the media, that such individuals may apply for a determination of eligibility for reimbursement of expenditures or personal obligations incurred in FY 1982 for training costs and for up to 26 weeks of extended benefits for weeks of such training; and conduct *de novo* approval determinations for eligible individuals using existing guidelines; it is further

ORDERED that the Secretary make available to participating SESAs funds for reimbursement of training costs under the terms of this order up to $85,120,000 from the amount federally unobligated in the Employment and Training Assistance (ETA) account at the end of FY 1982; up to $33,933,000 for payment of extended weeks of trade adjustment benefits under the terms of this order from the amount federally unobligated in the FUBA account for FY 1982; and up to $4,976,000 for SESAs' administrative costs in implementing this order from the amount federally unobligated in FY 1982 for state administrative expenses relating to the unemployment insurance and employment service systems; and it is further

ORDERED that the Secretary make all reasonable efforts to ensure payment is made to individuals determined entitled to relief under the terms of this order no later than December 30, 1983.

/s/ JUNE L. GREEN
U.S. District Judge

Appendix D

United States District Court for the District of Columbia

Civil Action No. 82-1458

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al.
Plaintiffs

v.

Raymond J. Donovan, Secretary of the United States Department of Labor
Defendant

[Filed Sept. 29, 1983]

ORDER

The Court having read plaintiffs' Motion to Clarify and defendant's response thereto, having heard oral argument on this motion and good cause having been shown, it is by the Court this 29th day of September 1983,

ORDERED that paragraph (2) on page 7 of this Court's Memorandum Order filed August 15, 1983, is hereby deleted, and in its place the following paragraph shall be substituted:

> (2) individuals who were eligible for training approval under the Trade Act after October 1, 1981, and were denied approval on the basis of insufficient funds or were told that their applications were being held in abeyance because there were insufficient funds, and who expended funds or incurred personal obligations in FY 1982 for costs of training which have not been reimbursed by any public source;

/s/ JUNE L. GREEN
U.S. District Judge

Appendix E

United States Court of Appeals
For the District of Columbia Circuit
No. 83-1918
September Term, 1983
Civil Action No. 82-1458

International Union, United Automobile,
Aerospace and Agricultural Implement
Workers of America, et al.,
Appellees

v.

Raymond J. Donovan, Secretary of the
United States Department of Labor,
Appellant

Before: Wright*, Edwards and Ginsburg, Circuit Judges

[Filed Sept. 23, 1983]

ORDER

Upon consideration of the appellant's motion for a stay of the district court's order of June 10, 1983, July 1, 1983 and August 15, 1983 pending appeal, it is hereby

ORDERED that the stay is granted in part and denied in part. Insofar as the District Court's orders of June 10, 1983, July 1, 1983 and August 15, 1983 obligated the Secretary to budget and set aside appropriated funds for disbursement under the Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1976 & Supp. V 1981), we deny the request for a stay. In other words, the Secretary shall be required to hold appropriated funds available for disbursement in the event that the District Court's orders are affirmed upon review of the merits of this appeal.

ORDERED further that the motion for stay is granted insofar as it seeks to prevent the current disbursement of funds. The Secretary has adequately demonstrated that irreparable harm will result if funds are disbursed prior to a final determination of the issues raised in this appeal. Furthermore, it does not appear that

the requisite irreparable harm will result to appellees if disbursement of funds is stayed until after this court has had an opportunity to consider the serious legal questions raised by this appeal. It is

FURTHER ORDERED that the Clerk is directed to schedule this case for argument during the January, 1984 sitting period. The briefing schedule shall be as follows:

Appellant's Brief and Appendix shall be filed and served	October 24, 1983
Appellee's Brief should be filed and served	November 23, 1983
Reply Briefs, if any, shall be filed and served	December 8, 1983

Per Curiam

For The Court:

GEORGE A. FISHER, CLERK

BY: /s/ Daniel M. Cathey
First Deputy Clerk

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* Circuit Judge Wright did not participate in this order.

Appendix F

United States Court of Appeals
For the District of Columbia Circuit
No. 83-1918
September Term, 1984
Civil Action No. 82-01458

International Union, United Automobile,
Aerospace & Agricultural Implement
Workers of America, et al.

v.

Raymond J. Donovan, Secretary of the
United States Department of Labor
Appellant

No. 83-2082
International Union, United Automobile,
Aerospace & Agricultural Implement
Workers of America, et al.
Appellants

v.

Raymond J. Donovan, Secretary of the
United States Department of Labor

Appeals from the United States District Court
for the District of Columbia.

BEFORE: Scalia and Starr, Circuit Judges, and Gesell,* District Judge of the United States District Court for the District of Columbia

[Filed Oct. 23, 1984]

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is

hereby vacated, in accordance with the Opinion for the Court filed herein this date. Case remanded with instructions.

Per Curiam
For The Court

/s/ George A. Fisher
Clerk

Date: October 23, 1984

Opinion for the Court filed by Circuit Judge Scalia.

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Appendix G

United States Court of Appeals
For the District of Columbia Circuit

No. 83-1918
September Term, 1984
CA 82-01458
International Union, United Automobile,
Aerospace and Agricultural Implement
Workers of America, et al.

v.

Raymond J. Donovan, Secretary of the
U.S. Department of Labor
Appellant

---

and Consolidated Case No. 83-2082

BEFORE: Scalia and Starr, Circuit Judges and Gesell, District Judge, U.S. District Court for the District of Columbia

[Filed January 11, 1985]

ORDER

On consideration of the petition for rehearing of appellees/cross-appellants, filed December 6, 1984, it is

ORDERED, by the Court, that the aforesaid petition is denied.

Per Curiam
For the Court:

GEORGE A. FISHER, CLERK

BY: /s/
ROBERT A. BONNER
CHIEF DEPUTY CLERK

Appendix H

United States Court of Appeals
For the District of Columbia Circuit

No. 83-1918

September Term, 1984

International Union, United Automobile,
Aerospace and Agricultural Implement
Workers of America, et al.

v.

Raymond J. Donovan, Secretary of the
U.S. Department of Labor
Appellant

AND CONSOLIDATED CASE NO. 83-2082

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

[Filed Jan. 11, 1985]

ORDER

The Suggestion for Rehearing *en banc* of appellees/cross-appellants, filed December 6, 1984, has been circulated to the full Court. A majority of Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Chief Deputy Clerk

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* Chief Judge Robinson and Circuit Judges Wright, Wald, Mikva and Edwards would grant the Suggestion for Rehearing *en banc*.

Appendix I

United States District Court
for the District of Columbia

Civil Action No. 82-1458

International Union, United Automobile, Aerospace &
Agricultural Inplement
Workers of America, et al.
Plaintiffs

v.

Raymond J. Donovan,
Secretary of the United States Department of Labor
Defendant

[Filed Jan. 31, 1985]

ORDER

In accordance with the United States Court of Appeals decision and mandate issued October 23, 1984, and January 30, 1985, respectively, it is by the Court this 31st day of January 1985,

ORDERED that judgment in this action is entered for the defendant.

/s/ JUNE L. GREEN
U.S. District Judge

Supreme Court, U.S.
FILED
SEP 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1935

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
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QUESTION PRESENTED

Whether the Secretary of Labor's decision not to allocate funds from a lump-sum appropriation to training under the Trade Act of 1974 is committed to agency discretion by law and thus not subject to judicial review.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1935

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 746 F.2d 855. The district court's opinion (Pet. App. A18-A34) is reported at 570 F. Supp. 210.

JURISDICTION

The judgment of the court of appeals (Pet. App. A45-A46) was entered on October 23, 1984. On March 26, 1985, Chief Justice Burger granted an extension of time for filing a petition to and including June 10, 1985. The petition for a writ of certiorari was filed on June 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and five individual union members who claim that they, and other similarly situated union members, were improperly denied training benefits under the Trade Act of 1974 (Trade Act or Act), 19 U.S.C. (1976 ed. & Supp. V 1981) 2101 *et seq.* Petitioners alleged, inter alia, that in fiscal year 1982, applicants for training under the Act were denied benefits solely because funds were not made available by the Secretary of Labor (Secretary). They brought this action in the United States District Court for the District of Columbia seeking declaratory and injunctive relief from the Secretary's decision not to allocate funds for Trade Act training from the lump sum appropriated by Congress for various employment and training programs in fiscal year 1982 continuing resolutions.

2. The Trade Act provides benefits to workers adversely affected by competition from goods imported from foreign countries. See 29 U.S.C. (1976 ed.) 2271-2322. The principal benefit provided to workers is a trade readjustment allowance (TRA), which supplements state unemployment insurance benefits of workers who have lost their jobs due to import competition. 19 U.S.C. (1976 ed.) 2291-2294. In addition, the Secretary of Labor "may approve" training for an eligible worker, thereby entitling the worker "to have payment of the costs of such training paid on his behalf by the Secretary." 19 U.S.C. (Supp. V 1981) 2296(a)(1)(E)(1). A worker who timely applies for training approved under the Act is also eligible for an additional 26 weeks of TRA benefits, upon exhauston of the basic allowance of 52 weeks. 19 U.S.C. (1976 ed.) 2293(a)(2), 2293(b).[1]

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[1]The Trade Act's assistance provisions are administered by "cooperating state agencies" that administer state unemployment insurance laws, pursuant to agreements with the Secretary. 19 U.S.C. (1976 ed.)

During fiscal year 1982, Congress did not enact an appropriations bill for the Department of Labor. Instead, funding was provided under a series of four continuing resolutions appropriating funds on the basis of an annualized rate for fixed periods of time.[2] During this period, the Secretary instructed the state agencies to approve training under the Act only if "[s]ufficient funds allocated to pay the costs of such training are available," and expressly directed that "[a] state agency shall not approve training for a worker when funds to be expended for this purpose would exceed the amount allocated by the Secretary." U.S. Dep't of Labor General Administration Letter No. 4-82, at 7 (Nov. 13, 1981) (C.A. App. 36, 42).[3] Thus, the state agencies were to operate on a "funds available" basis and were not to approve any training the costs of which would exceed their fund allocations under the continuing resolution appropriations.

In the first continuing resolution, Congress designated a general "lump-sum" appropriation at an annual level of approximately $3.7 billion for the Department's various employment and training programs, including the Trade Act program. Of this amount, the only funds expressly earmarked for a particular program were approximately $2

2311(a), 2319(9) and (10). Although the cooperating state agencies determine eligibility for benefits, 19 U.S.C. (1976 ed.) 2311, the program is fully financed by the federal government. 19 U.S.C. (1976 ed.) 2313.

[2]Act of Oct. 1, 1981, Pub. L. No. 97-51, 95 Stat. 958 *et seq.*; Act of Nov. 23, 1981, Pub. L. No. 97-85, 95 Stat. 1098; Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183 *et seq.*; Act of Mar. 31, 1982, Pub. L. No. 97-161, 96 Stat. 22.

[3]"C.A. App." refers to the joint appendix filed in the court of appeals.

million for the National Commission for Employment Policy.[4] Act of Oct. 1, 1981, Pub. L. No. 97-51, § 101(a)(1) and (3), 95 Stat. 958-959. The second and fourth continuing resolutions extended the expiration dates of the earlier resolutions without providing any new directives regarding the allocation of funds. Act of Nov. 23, 1981, Pub. L. No. 97-85, 95 Stat. 1098; Act of Mar. 31, 1982, Pub. L. No. 97-161, 96 Stat. 22. The Secretary allocated funds from these general lump-sum appropriations among authorized employment and training programs other than the Trade Act program.

In the third continuing resolution, Act of Dec. 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183 *et seq.*, Congress expressly

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[4]The first continuing resolution appropriated funds at the lower of the current rate or the appropriation foreseen in the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Act of 1982, which at that point had passed the House but not the Senate. See Section 101(a)(1) and (3), 95 Stat. 958-959. The applicable spending levels were therefore taken from the House-passed version of the 1982 Act, which provided an appropriation of $3.671 billion, some $3.472 billion below the 1981 appropriation. See H.R. Rep. 97-251, 97th Cong., 1st Sess. 6 (1981). This Act provided in pertinent part as follows:

> For expenses necessary to carry into effect the Comprehensive Employment and Training Act of 1973, as amended, sections 236, 237, and 238 of the Trade Act of 1974, as amended (19 U.S.C. 2101), section 51 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 51), sections 210, 211 and 212 of Public Law 95-250, and the Veterans' Employment and Readjustment Act of 1972, as amended (38 U.S.C. 2003A), including the purchase and hire of passenger motor vehicles, the construction, alteration, and repair of buildings and other facilities, and the purchase of real property for training centers as authorized by the Comprehensive Employment and Training Act of 1973, as amended, $3,671,129,000 plus reimbursements, of which $2,001,000 shall be for the National Commission for Employment Policy: *Provided*, That no funds from any other appropriation shall be used to provide meal services at or for Job Corps centers.

H.R. 4560, 97th Cong., 1st Sess. 2-3 (1981).

provided $25 million for the Trade Act program.[5] The Secretary allocated this full amount to Trade Act training, job search, and relocation—thereby authorizing the state agencies to pay for training of as many qualified applicants as this funding would permit.

3. In this action petitioners asserted, inter alia, that they had been wrongly denied training cost reimbursements and weekly TRA benefits because of the Secretary's administration of the program on a "funds available" basis under the first two continuing resolutions and his allocation of only $25 million to the program under the third and fourth resolutions (Pet. App. A5-A6). Petitioners maintained that the Act contemplated that a portion of the appropriation would be expended on each of the programs mentioned therein so that each would be "carr[ied] into effect." Petitioners further argued that Congress intended that the Secretary allocate a portion of the overall employment and training appropriation, as well as the designated $25 million, to the Trade Act training program (Pet. 5-6.).

On cross-motions for summary judgment, the district court concluded that since Congress had not established training as an entitlement, the court could not require the Secretary to spend more than the amount made available (Pet. App. A26). The district court further held, however, that Congress had made available more than $25 million for Trade Act training and that the Secretary's decision to allocate no more than that amount to the program was an abuse of discretion subject to judicial review and correction (*id.* at A30-A31). The court therefore ordered the Secretary

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[5]Section 101(a)(6) (95 Stat. 1185) provided:

> In addition to any sums otherwise appropriated [under the terms of Section 101(a)(1) of the resolution] there is appropriated an additional sum of $25,000,000 which shall be made available for training, job search allowances, and relocation allowances, under sections 236, 237, and 238 of the Trade Act of 1974.

to make available for Trade Act training certain funds that had lapsed to the Treasury; to conduct de novo approval determinations; to reimburse, on a funds available basis, actual training expenditures of eligible claimants who were denied approval for training on the basis of insufficient funds; and to consider payment of extended TRA benefits to these individuals (*id.* at A37-A41).

4. The court of appeals vacated the order of the district court and directed the entry of judgment for the Secretary (Pet. App. A17). The court first held that since a lump-sum appropriation vests discretion in the recipient agency to distribute funds as it sees fit among some or all of the permissible objects of the appropriation (*id.* at A10), the Secretary was "at most, [under] a directive to obligate *all* of the $3.7 billion" to employment and training programs (Pet. App. A13) (emphasis in original). Applying this standard, the court concluded that the required obligation had occurred (*ibid.*).

Alternatively, the court held that "[e]ven if * * * the meaning of lump-sum appropriations were not as clear as it is" (Pet. App. A13), the absence of any entitlement to training under the Act, or any restriction on the allocation of funds in the continuing resolution deprived the court of jurisdiction to review the Secretary's allocation of funds (*id.* at A14). Relying on *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, (1971), the court reasoned that since the applicable continuing resolution "carefully specifie[d]" how $2,001,000 of the lump-sum appropriation was to be spent "but provide[d] no direction as to how the remainder was to be distributed," there was "no law to apply" upon review of the Secretary's allocation of funds (Pet. App. A14). The court rejected as "an archetypically political task," petitioners' invitation to establish a "reasonable distribution" requirement for the allocation of available funds among the competing social programs (Pet. App.

A13-A14). Under *Overton Park*, the court held, the Secretary's allocation decisions came within the Administrative Procedure Act's (APA's) exception to judicial review for "agency action * * * committed to agency discretion by law" (5 U.S.C. 701(a)(2); Pet. App. A14).

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners first assert a conflict between the court of appeals' decision holding unreviewable the Secretary's lump-sum funding allocation and decisions of this Court and of other courts of appeals that apply a "strong presumption of reviewability" to final agency actions (Pet. 10-12). The cited cases, however, are inapposite. Unlike the instant case, they either did not concern the APA exception to judicial review for decisions "committed to agency discretion by law" (5 U.S.C. 701(a)(2)), or they involved clear instances of "law to apply" in judging an agency's exercise of discretion.

Petitioners acknowledge (Pet. 10) that 5 U.S.C. 701(a)(2) precludes judicial review when the governing legislation is "drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), quoting S. Rep. 752, 79th Cong., 1st Sess. 26 (1945). See also *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985), slip op. 8. They contend (Pet. 13-21), however, that the court below erred in finding there was "no law to apply" to the Secretary's funding allocation decision. This contention is without merit.

In *Heckler* v. *Chaney, supra*, this Court interpreted the exception to the APA's judicial review provisions for agency action "committed to agency discretion by law." 5 U.S.C. 701(a)(2). That case involved the reviewability of a Food and Drug Administration (FDA) decision not to take requested enforcement action under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.* The Court reaffirmed the applicability of the exception to the APA's judicial review provisions "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Slip op. 8-9. Noting the "permissive" language of the governing statutory enforcement provisions and the fact that the statute "authorized" the FDA to take certain actions without giving any indication of when or how such actions should be taken, the Court concluded that those provisions committed complete discretion to the FDA to decide how and when the agency's authority thereunder should be exercised.

The Court in *Chaney* further held that an agency's decision not to take enforcement action is presumptively immune from judicial review under 5 U.S.C. 701(a)(2), unless Congress has indicated otherwise by providing statutory guidelines for the agency to follow in exercising its enforcement powers. Slip op. 11 (footnote omitted). In reaching this conclusion, the Court elaborated reasons for the "general unsuitability" for judicial review of agency decisions to refuse enforcement, citing considerations of agency expertise in assessing whether the action best fits the agency's overall policies and how best to order its priorities and devote its limited resources. Similar considerations pertain to the Secretary's funding allocation decisions in this case.

Like the statutory enforcement provisions in *Heckler* v. *Chaney, supra*, the Trade Act and the appropriation resolutions at issue in this case are "drawn so that a court would

have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, slip op. 8-9. As the court of appeals correctly concluded, neither the Trade Act provisions nor the appropriations language provides any standards for judging the Secretary's exercise of discretion in distributing funds from the general employment and training account among the permissible objects of the appropriation. The Trade Act's substantive provisions on training are entirely permissive; if the Secretary determines that certain conditions are met, "he *may* approve such training." 19 U.S.C. (Supp. V 1981) 2296(a) (emphasis added).[7] Similarly, the relevant appropriations merely provide an overall sum for several authorized programs and activities, without giving any indication of how the Secretary should distribute that sum. In short, there is no law to apply to the Secretary's exercise of discretion.

2. Although petitioners concede (Pet. 17) that "a large measure of discretion is left to the Executive in its allocation decisions," they nevertheless contend (Pet. 17-18) that the Secretary's decision not to allocate funds to the Trade Act training program is reviewable because it is subject to the congressional requirement that the funds be used to "carry into effect" specific programs. As the court below pointed out, however, this argument is belied by congressional understanding, as reflected in the legislative history of the provisions in issue, that "[a] lump-sum appropriation leaves it to the recipient agency * * * to distribute the funds among some or all of the permissible objects as it sees fit" (Pet. App. A10) (footnote omitted).

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[7]In view of this permissive language, the district court expressly concluded (Pet. App. A25-A26), and petitioners no longer dispute (Pet. App. A10-A11, n.5), that Congress did not establish training as an entitlement under the Act.

Reviewing the pertinent legislative history, the court of appeals found "at least a congressional realization, if not a congressional intent, that nothing would be expended for Trade Act training out of the $3.7 billion lump-sum appropriation" (Pet. App. A8). As reflected in the cited legislative history, an executive branch request for Trade Act training funds was not included in the appropriation reported by either the House or Senate committees, and proposals to amend the appropriation on the House and Senate floors for the purpose of specifically earmarking a portion of the lump-sum appropriation for Trade Act training were unsuccessful (*id.* at A8, A9). The court below also cited the remarks of representatives and senators who supported these unsuccessful amendments as indicative of congressional understanding that in the absence of specifically earmarked sums for this purpose, there would be no requirement to fund Trade Act training out of the lump-sum appropriation (*ibid.*).

Petitioners further argue (Pet. 11) that operative language in the third continuing resolution can be read to reflect an understanding that allocation of funds for Trade Act training had already been mandated.[8] But, as the court below observed, the cited language could as readily be interpreted to mean that Congress did not intend "to *preclude* the *discretionary* expenditure of some of the $3.7 billion for that purpose" (Pet. App. A12). The court of appeals correctly determined that the latter interpretation is "consistent with the ordinary understanding of lump-sum appropriations" (Pet. App. A 10, A12). Moreover, because the appropriations in question do not contain any explicit

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[8]Petitioners refer to language in the third continuing resolution that provides: *"In addition to any sums otherwise appropriated* there is appropriated an *additional* sum of $25,000,000 which shall be made available for training, job search allowances and relocation allowances. § 101(a)(6) of 95 Stat. 1185 (emphasis added).

congressional guidance concerning the distribution of funds among their authorized purposes, and because "the distribution of public funds among competing social program is an archetypically political task" (Pet. App. A13), the court below correctly held that the Secretary's decision not to allocate these generally appropriated employment and training funds to Trade Act training is unreviewable.

3. Contrary to petitioners' contention (Pet. 11), the decision below is silent as to the application of any presumptions and is entirely harmonious with an analysis employing a presumption of reviewability. Thus, factors such as those found determinative by the court of appeals — *i.e.*, the non-mandatory language of both the substantive statute and the lump-sum appropriations acts, and the unsuitability for judicial review of agency decisions involving considerations of agency expertise in distributing limited public funds among competing social programs — have been held by the D.C. Circuit itself to be sufficient grounds to preclude review even where a presumption of reviewability has been held to apply. See *Falkowski* v. *EEOC*, No. 764 F.2d 904, 911 (D.C. Cir. 1985) ("superiority of the agency as a decisionmaker on the questions at issue and the absence of any congressional pronouncements cabining the agency's discretion" were sufficiently weighty considerations to overcome the usual presumption of reviewability).[9]

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[9] *Falkowski* involved the Department of Justice's refusal to provide legal representation for an EEOC official in a civil rights action brought by a subordinate employee. The court of appeals had initially held that the decision not to provide representation was judicially reviewable based on certain "pragmatic considerations." 719 F.2d 470 (D.C. Cir. 1983). This Court vacated the judgment and remanded the case for further consideration in light of this Court's decision in *Heckler* v. *Chaney, supra.*

On remand, the court of appeals did not apply any presumption of *un*reviewability. The court held, however, that the presence of other factors equally important to the decision in *Chaney* overcame the usual

4. Nor is there any conflict between the court of appeals' holding of nonreviewability here case and the exercise of judicial review in the so-called "impoundment cases" cited by petitioners (Pet. 12, 15). As the court below correctly noted (Pet. App. A12-A13), those cases are distinguishable from this one in that they involved executive agencies' refusals to obligate funds in the face of specific congressional directives concerning the allocation or expenditure of appropriated funds. Here, there has been no refusal to obligate funds.[10] Moreover, in the instant case, Congress permitted, but did not require, the Secretary to provide training benefits, 19 U.S.C. (Supp. V 1981) 2296(a), and generally authorized, but did not direct, the allocation or expenditure of funds for this and other purposes. The "impoundment cases" are therefore inapposite.

In sum, Congress granted the Secretary broad, unrestricted discretion to determine the scope of the Trade Act training program within available appropriations and to allocate generally appropriated employment and training

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presumption of reviewability, rendering the action unreviewable. Because an agency's funding decision under a lump-sum appropriation has historically been regarded as the special province of the Executive Branch, the present case presents especially strong reasons for concluding that the Secretary's decision is not subject to judicial review.

[10]As the court of appeals noted (Pet. App. A13 & n.6), petitioners did not allege, nor did the evidence show, that the Secretary "impounded" funds by refusing or failing to obligate the sums appropriated. Rather, petitioners disputed the Secretary's decisions concerning the allocation of funds among the various authorized programs and the availability for Trade Act training purposes of certain obligated funds that had not been exhausted by the end of the fiscal year and were accordingly remitted to the Treasury (Pet. App. A19). Petitioners now suggest (Pet. 6-7 n.4; *id.* at Pet. 16 n.14) that the court below was factually mistaken in stating that the Secretary actually obligated the entire lump-sum appropriation. Because petitioners did not allege a failure to obligate, however, this factual determination is irrelevant to the question before the Court and does not warrant the Court's attention.

funds as he saw fit. The court of appeals therefore correctly held that the Secretary's allocation decision is committed to agency discretion by law, and not subject to judicial review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-1935

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, MARIAN JACKSON, REGINALD JAMES, EMMETT POMPEY, EFFIE L. SIMMONS, AND HELEN VANCE,
Petitioners,

VS.

WILLIAM E. BROCK, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,
Respondent.

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No. 84-1935

In the Supreme Court

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OCTOBER TERM, 1984

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA,
MARIAN JACKSON, REGINALD JAMES, EMMETT POMPEY,
EFFIE L. SIMMONS, AND HELEN VANCE,
Petitioners,

VS.

WILLIAM E. BROCK, SECRETARY OF THE
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

REPLY TO BRIEF IN OPPOSITION

The court of appeals held that the Secretary of Labor had absolute, unreviewable discretion to refuse to spend any appropriated funds on a congressionally-established training program despite the fact that Congress in the pertinent appropriation had expressly required that program to be "carr[ied] into effect." The government contends that this result is proper, notwithstanding the appropriations language, on the theory that unless Congress has specified the precise dollar amount to be allocated to a particular statutory program, the Executive's funding allocation decisions are wholly insulated from judicial review. This contention ignores the "strong presumption of reviewability" under the Administrative Procedure Act, is inconsistent with numerous cases from this Court and the courts of appeals holding that judicial review *is* available to determine whether the Executive abused its discretion in failing to spend money appropriated by Congress, and is irreconcilable with the pertinent approprations language. Certiorari should be granted to restore to Congress its traditional control over the appropriations process and to ensure that statutory programs created by Congress may continue to be implemented without Congress having to immerse itself in the myriad of budgetary details surrounding each program it wishes to have "carr[ied] into effect."

1. The government first contends that this Court's recent decision in *Heckler v. Chaney*, ___ U.S. ___, 105 S.Ct. 1649 (1985), which created a presumption of *un*reviewability for agency non-enforcement decisions, should be extended to require a presumption of unreviewability for agency funding decisions as well.[1] However, such an extension of the present law would be inconsistent with the *Heckler* decision[2] as well as with other decisions of this Court and numerous courts of appeals.[3] The

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[1] Government's Brief in Opposition ("Gov. Br."), at 8, 11.

[2] *See* 105 S.Ct., at 1655, 1659.

[3] While the government argues that the cases cited by petitioners to support the presumption of reviewability "are inapposite [because] they did not concern the APA exception to judicial review for decisions 'committed to agency discretion by law' (5 U.S.C. § 701(a)(2))," this argument is simply incorrect. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) ("the Administrative Procedure Act embodies the basic presumption of judicial review . . . so long as no statute

government's contention therefore supports *granting* the Petition for Certiorari, rather than denying it, because so significant a change in the law of judicial review, particularly in the sensitive area of congressional appropriations, should not be permitted without this Court's plenary consideration.[4]

Somewhat inconsistently, the government also suggests that the court of appeals' analysis "is entirely harmonious with an analysis employing a presumption of reviewability." Gov. Br., at 11. This argument is presumably made to avoid conceding that the court of appeals' decision creates a conflict among the circuits and with decisions of this Court with respect to the presumption issue. But the government's argument is belied by the court of appeals' refusal to adopt a construction of the appropriations language that the court itself acknowledged "could indicate" Congress' understanding that funding for Trade Act training had been required.

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precludes such relief *or the action is not one committed to agency discretion"*) (emphasis added); *Hondros v. Civil Service Comm'n,* 720 F.2d 278, 291-92 (3d Cir. 1983); *Hartigan v. Federal Home Loan Bank Bd.,* 746 F.2d 1300, 1305 (7th Cir. 1984); *see also Train v. City of New York,* 420 U.S. 35 (1975).

[4] The change in the current law of judicial review advocated by the government is not warranted. When Congress appropriates funds and indicates to the agency that a particular program should be implemented, this congressional directive must be binding on the agency for Congress effectively to be able to perform its constitutional function. Agency funding decisions made pursuant to such appropriations are significantly different from agency non-enforcement decisions, for as this Court noted in *Heckler v. Chaney,*

> an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

Heckler v. Chaney, supra, 105 S.Ct., at 1656.

Gov. Br., at 10, *quoting* Pet.App. A12.[5] If the ordinary strong presumption of reviewability had been applied to the "carry into effect" language of the pertinent appropriations, there can be little doubt that the court of appeals would have agreed with the district court that the Secretary's refusal to provide funding was judicially reviewable.

2. The government attempts to avoid conceding the existence of a circuit conflict with respect to the "impoundment cases" cited by petitioners[6] by stating that in each of those cases, the agencies had "refus[ed] to obligate funds in the face of specific congressional directives concerning the allocation or expenditure of funds, [but here] there has been no refusal to obligate funds." Gov. Br., at 12. That distinction is utterly spurious.

First, there *has* been a "refusal to obligate" in this case no less than in those other impoundment cases. The undisputed facts demonstrate that the Secretary refused to obligate *any* funds to the Trade Act training program from the $3.7 billion ETA appropriation in FY 1982. Moreover, the undisputed facts further demonstrate that of the $89 million in unspent monies in the ETA account at the end of FY 1982, *approximately $8.6 million had never been obligated by the Secretary to any program, Trade Act or otherwise.*[7] This case is therefore indistinguishable from the

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[5] It is further belied by the fact that the two D.C. Circuit judges who sat on the panel below have previously stated in express terms that *no* presumption of reviewability is appropriate under the APA. *See* Petition for Certiorari ("Cert. Pet."), at 11, n.9.

[6] *E.g., Train v. City of New York,* 420 U.S. 35 (1975); *State Hwy. Comm. v. Volpe,* 479 F.2d 1099 (8th Cir. 1973); *Sioux Valley Empire Electric Assoc. v. Butz,* 504 F.2d 168 (8th Cir. 1974); *City of Los Angeles v. Adams,* 556 F.2d 40 (D.C. Cir. 1977); *Comm. of Pennsylvania v. Lynn,* 501 F.2d 848 (D.C. Cir. 1974).

[7] The government admitted to the district court that $8.6 million from the ETA account had *never* been obligated to *any* program by the Secretary in FY 1982:

> We are also filing a new declaration of Sandra T. King updating Attachment 1 to her November declaration to provide end of year data for FY 1982 for the entire Employment and Training Account of the Labor Department [*see* Jt. App., at 106]. This is the account from which plaintiffs believe additional funds should have been drawn for Trade Act training. . . . [This declaration shows that] of

impoundment cases cited by petitioners, and under the court of appeals' own reading of those cases, judicial review should have been available.[8]

Second, the "impoundment" cases cannot validly be distinguished on the ground that they involved "specific congressional directives" to spend, for the directive to spend is no less specific in this case than in the cases cited by petitioners.[9] Nor is it a distinguishing factor that the Trade Act is not an individual "entitlement" program in that the Secretary "may" rather than

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> the $89 million [available] at the end of the year, some $4 million was money specifically appropriated for Job Corps training for FY 1982 and FY 1983, and some $77 million was prior year (1981) monies previously obligated for grants and contracts associated with the Comprehensive Employment and Training Act ("CETA") Public Service Employment Program which were closed out in FY 1982. These funds were deobligated and returned to the Government as public service employment grants and contracts were closed out. *See id. Only $8.6 million of funds in the entire Account were never federally obligated during the fiscal year* . . . .

Def. Mem. in Opp. to Pl. Cross-Motion for Summary Judgment, at 17 (emphasis added). Petitioners relied on this admission in their Reply Memorandum re Summary Judgment, at 26, n.23 (Defendant concedes that "$8.6 million of funds in the [ETA] account were never federally obligated at the end of the fiscal year"), in their Opposition to Defendant's Motion for Reconsideration, Clarification and Stay, at 11, in their brief to the court of appeals, at 38, and in their brief in support of rehearing *en banc*, at 4, n.4. In light of this admission and the facts that underlie it, the government is plainly mistaken in its assertion that "petitioners did not allege, nor did the evidence show, that the Secretary 'impounded' funds by refusing or failing to obligate the sums available." Gov.Br., at 12, n.10.

[8] *See* Gov. Br., at 6, *quoting* Pet.App.A13 (acknowledging that in the present case the Secretary was under " 'a directive to obligate *all* of the $3.7 billion to employment and training programs' ").

[9] *See, e.g., Sioux Valley Empire Electric Assoc. v. Butz*, 504 F.2d 168, 174-75 (8th Cir. 1974) (rejecting argument that allocation of funds was not required because Rural Electrification Act "authorized and empowered" the expenditure of funds, but did not "direct" the expenditure of funds).

"must" approve training,[10] for *none* of the impoundment cases cited by petitioners were entitlement cases. Moreover, in most of those cases the courts specifically *rejected* arguments that, because the substantive provisions of the pertinent statutes were written in permissive rather than mandatory terms, the Executive's refusal to provide funding was unreviewable.[11] The lack of any statutory entitlement should not preclude judicial review in the present case any more than it did in the cited cases. *See, e.g., Sioux Valley Empire Electric Assoc. v. Butz, supra,* 504 F.2d, at 172-73 (there is " 'law to apply' " in construing the relevant funding provisions, and therefore the Administrator's decision is "not wholly 'committed to agency discretion by law' ").[12]

3. The express congressional directive "to carry into effect" the Trade Act program "and" four other training programs is plain on its face. Coupled with Congress' subsequent appropriation of "additional" funds for Trade Act training, that language was more than sufficient to permit judicial review of the Secretary's denial of Trade Act funding, particularly in light of the "strong presumption of reviewability" under the APA. The court

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[10] *See* Gov. Br., at 12; *see also id.*, at 9, 11. Once training is "approved" by the Secretary, however, the individual import-affected workers who have received such training approval become statutorily entitled to federal reimbursement of their training costs. *See* 19 U.S.C. § 2296(a).

[11] *See, e.g., Sioux Valley Empire Electric Assoc. v. Butz, supra,* 504 F.2d, at 176-78 (rejecting argument that Congress' deletion of mandatory language from the Act vested the Secretary with unreviewable discretion to refuse to implement rural electrification program); *State Hwy. Comm. v. Volpe,* 479 F.2d 1099, 1108-12 (8th Cir. 1973) (holding that although the Federal-Aid Highway Act vests the Secretary with discretion in approving State highway programs, he may not withhold approval for reasons not contemplated by the Act).

[12] The fact that a program is an entitlement program is relevant only to whether the Executive must provide funding to every eligible applicant for benefits. Under a non-entitlement program—which encompasses the vast majority of statutory programs—benefits need only be provided to the extent funds have been appropriated. Until the present case, *no* court has held that the Executive may refuse to spend appropriated funds to implement a statutory program simply because that program does not create an individual entitlement to benefits.

of appeals reached the opposite conclusion because it labelled the pertinent appropriation a "lump-sum appropriation" and concluded that the "ordinary understanding of lump-sum appropriations" is that they "leave[ ] it to the recipient agency . . . to distribute the funds among some or all of the permissible objects as it sees fit." Gov. Br., at 9, 10. But that conclusion completely ignores the plain language of the appropriations bill, notwithstanding the settled principle that one must always look first to the statutory language in discerning congressional intent. See *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).[13] The court's conclusion also imposes an enormous, and unwarranted, burden on Congress with respect to future appropriations, requiring Congress henceforth either to

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[13] The government suggests that the legislative history underlying Congress' First and Third Continuing Budget Resolutions supports the Secretary's action in refusing to provide funds to the Trade Act training program. *See* Gov. Br., at 10. However, the question of whether the Secretary properly exercised his discretion in failing to "carry into effect" the program is a question on the merits, not of judicial reviewability. Reliance on this history therefore supports petitioners' contention that there is "law to apply" in this case.

In any event, the government's reliance on this legislative history is misplaced. Rather than demonstrating what the government and court of appeals curiously describe as "at least a congressional realization, if not a congressional intent, that nothing would be expended for Trade Act training" (Gov. Br., at 10, *quoting* Pet.App. A8), the legislative history cited by the government merely demonstrates that certain *supporters* of Trade Act training had unsuccessfully urged their colleagues to *earmark* a specific amount from the $3.7 billion appropriation for Trade Act training. *See* Cert. Pet., at 19-20, n.19. Moreover, the considerable legislative history to which the government and court of appeals *did not ever refer*—although cited in the Petition for Certiorari and relied upon by the district court (*see* Cert. Pet., at 14, n.11, 19-20, n.19; App., at 27-30)—fully supports petitioners' construction of the congressional intent. In any event, there is no need to consider *any* of the legislative history, because the congressional intent is sufficiently demonstrated by the language of the appropriations itself. *See LTV Aerospace Corp.*, 55 Comp. Gen. 307 (Oct. 1, 1975) (resort to legislative history is not appropriate where language of appropriation is plain on its face).

refrain from funding more than one statutory program in a single appropriation, or to earmark in each of its multiprogram appropriations an exact sum of money to be spent on each individual program that it wishes to be "carr[ied] into effect"—and thus to deprive the Exective of much of the administrative discretion it currently enjoys in allocating funds among statutory programs.

Neither the government nor the court of appeals ever explains *why* the multiprogram appropriation at issue in this case—or any of the similar multiprogram appropriations enacted by Congress in recent years (*see, e.g.,* Cert. Pet., at 12-13, n.10)—should be considered "lump-sum appropriations" as that term has generally been understood in the appropriations process.[14] Simply to apply the descriptive term "lump-sum appropriation" is no substitute for analyzing the appropriations language itself, which is the *only* permissible way to determine whether Congress imposed any requirements or limitations on Executive spending in a particular appropriation. As petitioners have shown, the plain words of the

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[14] As petitioners explained in their Petition for Certiorari, a "true" lump-sum appropriation makes funds available for one or more purposes or programs with no statutory indication as to whether, or how, those funds should be allocated. *See* Cert. Pet., at 17, n.15.

pertinent ETA appropriation require the Secretary to implement *each* of the training programs designed by Congress.[15]

CONCLUSION

For the reasons stated in the Petition for Certiorari and in this Reply Brief, the Petition for Certiorari should be granted, and this case set for plenary review.

Respectfully submitted,

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[15] The government persists in asserting that petitioners are requesting the courts to determine the precise allocation of funds among competing social programs. Gov. Br., at 6, 11. That is not so. As the district court recognized, petitioners asked only that the courts determine whether the Secretary's refusal to provide any funding to the Trade Act training program from the $3.7 billion ETA appropriation was consistent with his statutory mandate "to carry into effect" that program. The precise amount of funds necessary to achieve that result is for the Secretary, not the courts, to decide, and petitioners have only asked that the courts review that decision for reasonableness and consistency with the congressional directive. *See* Cert. Pet., at 20-21.